(19,077.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 121.

P. L. FLANIGAN, PETITIONER,

vs.

THE COUNTY OF SIERRA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 8, 1904.

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a In the United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Transcript of Record.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

1 In the Superior Court of the State of California in and for the State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Complaint.

The plaintiff complains of defendant, and for cause of action alleges:

I.

That the County of Sierra is a body politic and corporate under the laws of the State of California.

II.

That on the 31st day of May, A. D. 1900, the board of supervisors of said Sierra county ordained and passed the following ordinance, to wit:

"*Ordinance No.* 54.

An ordinance to license the business of raising, grazing, herding, or pasturing sheep within the county of Sierra, fixing the rates of the license tax therefor, and providing for the collection of the same.

The board of supervisors of the county of Sierra do ordain as follows:

2 SECTION 1.

Each and every person, copartnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the county of Sierra, State of California, must annually procure a

license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm or corporation, and used in such business in said county.

SECTION 2.

Each and every person, copartnership, firm or corporation, who may engage in the business of raising, grazing, herding or pasturing sheep within the county of Sierra, State of California, in order to procure a license therefor, must present to the license collector of said county at the time of making application therefor the affidavit of such owner, his foreman, agent or person in charge of such sheep, showing the number of sheep owned by, and in the possession of and under the control of such applicant for license within said county, and upon presenting such affidavit and the payment of the license tax, as prescribed in section 1 of this ordinance, the applicant shall be granted a license to raise, graze, herd or pasture sheep within the said county of Sierra.

The collector, or his deputy, may administer all oaths under this section, and must do so without charge.

SECTION 3.

Each applicant for license under this ordinance must, if re-
3 quired by the collector, permit the sheep owned by him or under his control to be counted, and in case of refusal to make the affidavit mentioned in section 2 of this ordinance it is hereby made the duty of said collector to count said sheep prior to his issuing said license.

SECTION 4.

All licenses to be collected under this ordinance are payable annually, and shall become due and payable in advance at the office of the license collector, and if any license is not paid within fifteen days after the commencement of said business, an additional tax of ten per cent. is hereby added, to be collected with the original amount.

SECTION 5.

The county auditor shall prepare and have printed suitable blank licenses for the license collector to carry out the provisions of this ordinance, with blank receipts for the license collector when sold.

SECTION 6.

The license collector must return the stubs of all licenses sold by him to the auditor, together with the affidavit mentioned in section two of this ordinance, and the auditor must keep the same in his office for the period of one year after the license corresponding with

such stubs have been sold by the license- collector, or until such further time as the license account has been examined by an expert legally appointed as such, and said expert shall report such license account correct and his report has been approved by the board of supervisors, after which time the auditor may destroy the stubs.

4 SECTION 7.

The amount of the license tax fixed by this ordinance for the transaction or carrying on of any business named herein shall be deemed a debt due to the county of Sierra, and if any person fails neglects, or refuses to take out and procure a license used under the provisions and in the manner provided in this ordinance, the said license collector shall direct the district attorney of said county to bring suit in the name of the county of Sierra for the recovery of such license, and in such case either the license collector or the district attorney may make the necessary affidavits for, and a writ of attachment may issue without any bonds on the part of the plaintiff, and in case of recovery by the plaintiff fifty dollars damages and costs must be added to the judgment to be collected from the defendant.

SECTION 8.

The license collector shall issue licenses for the year in which said license is procured, and out of each license collected by him he may retain for his fee therefor the sum of 10 per cent. thereof, which said fee shall belong to him. Provided that in all cases where said collector does not return the affidavit with the stub of the license, as provided for in section six of this ordinance, said fee shall not be retained by said collector nor belong to him, except that in lieu of said affidavit he may return with said stub the affidavit of himself or deputy, showing that he has counted the sheep for the pasturing of which a license was granted without the affidavit mentioned
5 in section two of this ordinance, whereupon he may retain said fee, but in case said affidavit mentioned in said section two, or the affidavit of himself or deputy, as to the counting of said sheep is not returned with said stub, the whole of the said amount received for said license shall be paid over to said county.

SECTION 9.

Years within the meaning of this ordinance shall commence on the 1st day of January, and end on the 31st day of December.

SECTION 10.

All money collected for licenses under the provisions of this ordinance, less said fee of ten per cent., shall be paid over to the county treasurer, as other moneys are, and be placed to the credit of the general fund of the county.

All ordinances, or parts of ordinances, in conflict herewith are hereby repealed; provided, however, that nothing in this ordinance shall be so construed as to prevent said Sierra county from recovering, by suit or otherwise, any license tax that may have heretofore accrued under any former law or ordinance, or from instituting or conducting such proceedings, civil or criminal, as may be provided for in such former law or ordinance.

This ordinance shall take effect on and after fifteen days from its passage.

The above ordinance having been read to, and duly considered by the board, was put upon it passage, and was adopted and passed by the board of superivisors of Sierra county, California, at a special meeting thereof called for said purpose, this 31st day of May, A. D. 1900, by the following vote:

6 First district, William Donaldson, aye; second district, Clarence Hooper, aye; third district, Henry H. Meyer, aye; fourth district, J. M. Gorham, aye; fifth district, J. J. Millar, aye.

HENRY H. MEYER,
Chairman of said Board.

Attest:
[SEAL.] HENRY E. QUIGLEY, *Clerk.*

STATE OF CALIFORNIA, } *ss:*
County of Sierra, }

I, Henry E. Quigley, clerk of the county of Sierra, and *ex-officio* clerk of the board of supervisors of said county, do hereby certify that the foregoing ordinance, entitled ordinance No. 54, consisting of ten sections, was duly passed by the said board of supervisors at a special meeting thereof called for said purpose, on the 31st day of May, 1900, and by the following vote: Ayes, Supervisors William Donaldson, Clarence Hooper, H. H. Meyer, J. M. Gorham and J. J. Millar; noes, none.

[SEAL.] HENRY E. QUIGLEY,
County Clerk of Sierra County and ex-Officio Clerk of the Board of Supervisors."

III.

That said ordinance No. 54 was duly enacted, passed and ordained at a special meeting of the said board of supervisors duly called for said purpose. That said ordinance was upon the passage of the same signed by the chairman of the board of supervisors and attested by the clerk, and the votes of the several members
7 of the board were entered on the minutes of said board, and on the 31st day of May, 1900, said ordinance was duly entered at length in the ordinance book of said county.

Before the expiration of fifteen days after the same was passed said ordinance was duly published, with the names of the members

of said board voting for and against the same, for at least one week in the "Mountain Messenger," a newspaper published in said county.

IV.

That the said defendant, between the 1st day of May, 1900, and the 25th day of June, 1900, was engaged in and still is engaged in the business of raising, grazing, herding and pasturing sheep in the said county of Sierra, State of California, and that he then had and now has in his possession and under his control and in said business twenty-five thousand (25,000) sheep.

V.

That said defendant has not procured from the license collector of said county the license provided for in said ordinance, nor has he paid therefor the said sum of ten cents for each sheep or lamb so in his possession and under his control in said business as aforesaid.

VI.

That the defendant, under the provisions of said ordinance No. 54, became and is now indebted to the said county of Sierra in the sum of two thousand five hundred (2,500) dollars for a license for the carrying on of said business in said county, and is further
8 indebted to said plaintiff in the sum of fifty (50) dollars damages for his neglect in procuring said license.

VII.

That the plaintiff has duly demanded payment of defendant of said license under the provisions of said ordinance, but the said defendant has not paid any part thereof, and there is now due and owing from said defendant to plaintiff the sum of two thousand five hundred and fifty dollars for said license and damages as aforesaid.

VIII.

That the license tax collector of said county has directed the district attorney of said county to bring this suit.

Wherefore the plaintiff demands judgment against the said defendant for the sum of two thousand five hundred and fifty dollars, together with costs of this action.

FRANK R. WEHE,
District Attorney of Sierra Co.

STATE OF CALIFORNIA, } ss:
County of Sierra, }

August C. Busch, being first duly sworn, says that he is the license collector of said county; that he has heard the said complaint read, and knows the contents thereof; that the same is true of his own

knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

AUG. C. BUSCH.

9 Subscribed and sworn to before me, this 25th day of June, 1900.

[NOTARY SEAL.] FRANK R. WEHE,
Notary Public in and for Sierra Co., Cal.

(Endorsed:) Filed June 25, 1900. Henry E. Quigley, clerk.

In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Notice of Motion for Order of Removal of Cause.

To Frank R. Wehe, district attorney of Sierra county, attorney for plaintiff:

Please take notice that the defendant in the above-entitled case will, on Tuesday the 7th day of August, 1900, at ten o'clock a. m., or as soon thereafter as counsel can be heard, move the above-entitled court for an order removing said cause to the circuit court of the United States, for the northern district of California, ninth circuit, in accordance with the petition of defendant, a copy of which is hereto attached.

Dated July 31st 1900.

CAMPBELL & METSON,
Attorneys for Defendant.

10 (Endorsed:) Original. In the superior court of the county of Sierra, State of California. The County of Sierra, plaintiff, vs. P. L. Flanigan, defendant. Notice of motion. Filed July 31st, 1900. Henry E. Quigley, clerk. Reddy, Campbell & Metson, attorneys for —.

In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Special Appearance of Defendant.

To the plaintiff in the above-entitled case and to Frank R. Wehe, Esq., its attorney:

You are hereby notified that we, the undersigned, hereby enter our special appearance in the above-entitled case for the special pur-

pose, and none other, of filing a petition and bond for the removal of said case to the circuit court of the United States, ninth circuit, northern district of California.

CAMPBELL & METSON,
Attorneys for Defendant.

(Endorsed:) Original. In the superior court of the county
11 of Sierra, State of California. The County of Sierra, plaintiff, *vs.* P. L. Flanigan, defendant. Special appearance. Filed July 31st, 1900. Henry E. Quigley, clerk. Reddy, Campbell & Metson, attorneys for defendant.

In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Bond on Removal.

Know all men by these presents, that we, P. L. Flanigan, defendant in the above-entitled action, as principal, and The United States Fidelity and Guaranty Company, a corporation, of Baltimore, Md., as surety, are held and firmly bound unto the County of Sierra, a body politic and municipal corporation under the laws of the State of California, plaintiff in the above-entitled action, in the sum of one thousand dollars ($1,000), lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, and each of us, our successors, heirs, executors and administrators, jointly and severally by these presents.

The conditions of this obligation are such that, whereas,
12 the said P. L. Flanigan has applied, or is about to apply, by petition to the superior court of the State of California, in and for the county of Sierra, for the removal of a certain cause therein pending, wherein The County of Sierra, a body politic and municipal corporation under the laws of the State of California, is plaintiff, and P. L. Flanigan is defendant, to the circuit court of the United States, ninth circuit, for the northern district of California, for further proceedings, on the grounds in the said petition set forth, and that all further proceedings in said superior court in and for the county of Sierra be stayed:

Now therefore, if your petitioner, said P. L. Flanigan, shall enter in said circuit court of the United States, for the northern district of California aforesaid, on or before the first day of its next regular session, a copy of the records in said suit, and shall pay, or cause to be paid, all costs that may be awarded therein by the said circuit court of the United States, if said court shall hold that said suit was

wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

P. L. FLANIGAN.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Corporation Seal.]

By its attorneys in fact, I. D. MAXWELL AND W. RIGBY.

Signed, subscribed and sworn to this — day of ——, 1900.

—— ——.

13 (Endorsed:) Original. In the superior court of the county of Sierra, State of California. The County of Sierra, plaintiff, vs. P. L. Flanigan, defendant. Bond. Filed July 31st, 1900. Henry E. Quigley, clerk. Reddy, Campbell & Metson, attorneys for defendant.

In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Petition for Removal of Cause.

To the honorable superior court of Sierra county, State of California:

The petition of P. L. Flanigan, the defendant in the above-entitled action, respectfully shows to this honorable court:

I.

That your petitioner is the defendant in the above-entitled action; that the said action has been commenced against him in the said court by the plaintiff, to wit, The County of Sierra, a body politic and municipal corporation, under the laws of the State of California, and that said action is of a civil nature.

14 II.

That the said plaintiff, on the 25th day of June, 1900, filed its complaint against this defendant in the superior court of the State of California, in and for the county of Sierra;

That the time has not elapsed wherein your petitioner is allowed, under the practice and laws of the State of California, and the rules of said court, to appear, plead, demur, or answer said complaint.

III.

That at the time said action was commenced, and continuously for a long time prior thereto, ever since, and at all the times herein

mentioned, the said plaintiff, The County of Sierra, was and is a body politic and municipal corporation under the laws of the State of California; and that the said plaintiff, to wit, The County of Sierra, a body politic and municipal corporation under the laws of the State of California, was, at the time said action was commenced, and continuously for a long time prior thereto, ever since, and at all the time herein mentioned, is and was a citizen and resident of the State of California, within the jurisdiction of the United States circuit court, northern district of California, State of California.

That at the time said action was commenced, and continuously for some time prior thereto, ever since, and at all the times herein mentioned, the defendant was and is a resident and citizen of the State of Nevada, and not a resident of the State of California.

15 IV.

That the controversy in this action, and every issue of fact and law therein, is wholly between citizens of different States; and every issue of fact and law involved in this controversy can be fully determined as between them, that is to say, as between this plaintiff, The County of Sierra, a body politic and municipal corporation, and this defendant, P. L. Flanigan.

V.

That the time of this defendant, your petitioner here, to answer or plead to the complaint in the said action filed as aforesaid, in the said superior court of California, in and for the county of Sierra, on the 25th day of June, 1900, has not yet expired; and your petitioner has not yet filed any paper, appearance, or pleading in said action, nor has it in any other way appeared therein.

VI.

That the matter in dispute in said action, and for which said action is brought, is an alleged debt, to wit, the sum of two thousand five hundred and fifty dollars, exclusive of costs, alleged to be due from defendant to plaintiff.

VII.

Your petitioner herewith presents a good and sufficient bond, as provided by the statute in such case, that it will on or before the first day of the next ensuing session of the United States circuit court, northern district of California, file therein a transcript of the record in this action, and for the payment of all costs which
16 may be awarded by the said court, if said circuit court shall hold that this suit was wrongfully or improperly removed hereto; and your petitioner prays that this court proceed no further herein except to make the order of removal as required by law, and accept the bond presented herewith, and direct the tran-

script of the record herein to be made for said court, as provided by law, and as in duty bound, and your petitioner will ever pray.

P. L. FLANIGAN, *Petitioner.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

P. L. Flanigan, being duly sworn, says: that he is the defendant in the above-entitled action, and has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge.

P. L. FLANIGAN.

Subscribed and sworn to before me this 26th day of July, A. D. 1900.

[SEAL.] HOLLAND SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Original. In the superior court of the county of Sierra, State of California. The County of Sierra, plaintiff, *vs.* P. L. Flanigan, defendant. Petition. Filed July 31st, 1900. Henry E. Quigley, clerk. Reddy, Campbell & Metson, attorneys for defendant.

17 In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff, }
vs.
P. L. FLANIGAN, Defendant. }

Order of Removal of Cause.

On the pleadings and proceedings herein, and on the petition and bond filed herein by the defendant under the statutes of the United States, and on motion of Campbell & Metson, defendant's attorneys, it is ordered that the security offered by the defendant be accepted and said bond approved, and that the State court proceed no further in this cause, and that this cause be removed into the United States circuit court, ninth circuit, northern district of California, State of California.

Dated August 8, 1900.

STANLEY A. SMITH, *Judge.*

(Endorsed:) Original. In the superior court of the county of Sierra, State of California. The County of Sierra, plaintiff, *vs.* P. L. Flanigan, defendant. Order. Filed August 9th, 1900. Henry E. Quigley, clerk. Campbell & Metson, attorneys for defendant.

18 STATE OF CALIFORNIA, } ss:
County of Sierra, }

I, Henry E. Quigley, county clerk and *ex-officio* clerk of the superior court, in and for the county of Sierra, State of California, said court being a court of record, having a seal, hereby certify that the foregoing is a full, true and correct copy of the original complaint, petition for removal to circuit court, bond on same, special appearance, notice of motion for removal and order of court approving bond and ordering removal to circuit court, comprising the entire record in case No. 991, in which The County of Sierra, plaintiff, *vs.* P. L. Flanigan, defendant, as the same now remains of record and on file in the office of the clerk of said court.

Witness my hand, with the seal of said court affixed, this 9th day of August, 1900.

[Seal of Superior Court of Sierra County.]

HENRY E. QUIGLEY, *Clerk.*

(10c. internal revenue stamp.)

(Endorsed:) No. 12,967. United States circuit court, northern district of California. The County of Sierra *vs.* P. L. Flanigan. Certified copy of record transferred from Sierra county. Filed August 13, 1900. Southard Hoffman, clerk.

19 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE COUNTY OF SIERRA, Plaintiff, }
vs.
P. L. FLANIGAN, Defendant. }

Demurrer.

Comes now the defendant and demurs to plaintiff's complaint, and assigns the following ground of demurrer:

That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays to be hence dismissed with his costs.

J. C. CAMPBELL AND
W. H. METSON,
Attorneys for Defendant.

NORTHERN DISTRICT OF CALIFORNIA, } ss:
City and County of San Francisco, }

J. C. Campbell, being first duly sworn, on oath says that he is one of the attorneys of the defendant in the above-entitled action; that

the foregoing demurrer is not interposed for delay; that affiant makes this affidavit for the reason that defendant is absent
20 from and now out of the city and county of San Francisco wherein affiant resides.

J. C. CAMPBELL.

Subscribed and sworn to before me this 14th day of August, 1900.

[SEAL.] HOLLAND SMITH,
Notary Public, City and County of San Francisco.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.
Dated August 14th, 1900.

J. C. CAMPBELL,
Attorney for Defendant.

(Endorsed:) Filed August 16th, 1900. Southard Hoffman, clerk.

At a stated term, to wit, the November term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the courtroom in the city and county of San Francisco, on Monday, the 25th day of November, in the year of our Lord one thousand nine hundred and one.
Present: The Honorable William W. Morrow, circuit judge.

THE COUNTY OF SIERRA
vs.
P. L. FLANIGAN. } No. 12967.

Order Overruling Demurrer.

Defendant's demurrer to the complaint herein, heretofore
21 heard and submitted, having been fully considered, it was ordered that said demurrer be and hereby is overruled, in accordance with the oral opinion of the court this day delivered, with leave to defendant to answer within twenty days.
At a stated term, to wit, the March term, A. D. 1902, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California held at the courtroom in the city and county of San Francisco, on Friday, the 7th day of March, in the year of our Lord one thousand nine hundred and two.
Present: The Honorable William W. Morrow, circuit judge.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant. } No. 12967.

Order for Default and Judgment, etc.

In this cause the court having upon the 25th day of November, 1901, overruled defendant's demurrer to the complaint of plaintiff, with leave to defendant to answer said complaint within twenty days; and said time for answering having expired, and not having been extended, and said defendant having failed to answer the complaint herein, now upon motion of Frank R. Wehe, Esq., attorney for plaintiff, it is ordered that the default of said defendant
22 P. L. Flanigan be, and hereby is, entered herein, and it is further ordered that judgment be entered herein in favor of plaintiff and against the defendant in accordance with the prayer of plaintiff's complaint and for costs.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant. } No. 12967.

Judgment.

In this cause the court having upon motion of Frank R. Wehe, Esq., attorney for plaintiff, ordered that the default of the defendant be entered for failure to file an answer to the complaint within the time allowed by the court after the overruling of said defendant's demurrer to the complaint; and said default having been entered, and the court having thereupon ordered that judgment be entered in favor of plaintiff and against the defendant in accordance with the prayer of the complaint herein and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that the plaintiff, The County of Sierra, do have and recover of and from said de-
23 fendant, P. L. Flanigan, the sum of two thousand five hundred and fifty dollars, together with its costs in this behalf expended, taxed at $26.20.

Judgment entered March 7th, 1902.

SOUTHARD HOFFMAN, *Clerk.*

A true copy:
Attest:
[SEAL.]

SOUTHARD HOFFMAN, *Clerk,*
By W. B. BEAIZLEY, *Deputy Clerk.*

(Endorsed:) Filed March 7, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

COUNTY OF SIERRA
vs.
P. L. FLANIGAN. } No. 12967.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the circuit court of the United States, for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 7th day of March, 1902.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk*,
By W. B. BEAIZLEY, *Deputy Clerk*.

24 (Endorsed:) Judgment-roll. Filed March 7, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Petition for Writ of Error and Supersedeas.

P. L. Flanigan, the defendant above named, feeling himself aggrieved by the judgment of the above-entitled court, entered herein on the 7th day of March, 1902, comes now and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable, the United States circuit of appeals for the ninth circuit, and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon the said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States circuit court of appeals for the ninth circuit, and your petitioner will ever pray.

A. E. CHENEY,
CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendant.

(Endorsed:) Filed April 4, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Assignment of Errors.

Afterward comes P. L. Flanigan, the defendant above named, and says in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

I.

That the complaint of plaintiff above named in the said action does not state facts sufficient to constitute a cause of action.

II.

That the above-entitled court erred in making and entering, on, to wit, the 25th day of November, 1901, that certain minute order wherein and whereby the demurrer of said defendant to the said complaint was overruled.

III.

That said court erred in making and entering, on, to wit,
26 the 7th day of March, 1902, its order that the default of said defendant be entered for failure to file an answer to said complaint within the time allowed by said court after the overruling of said defendant's demurrer to said complaint.

IV.

That said court erred in giving, making and entering its certain judgment in said action that said plaintiff do have and recover from said defendant the sum of two thousand five hundred and fifty dollars, together with its costs in such behalf expended.

V.

That said court erred in giving, making and entering in said action its judgment in favor of said plaintiff and against said defendant.

Wherefore, said defendant prays that said judgment of said circuit court of the United States, in and for the ninth circuit, northern district of California, be reversed, and that said court be ordered to

make and enter its judgment that said plaintiff take nothing by its said action, but that said defendant be thence dismissed with judgment for his costs in such behalf expended.

A. E. CHENEY,
CAMPBELL, METSON & CAMPBLLL,
Attorneys for Defendant.

(Endorsed:) Filed April 4, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

27 At a stated term, to wit, the February term, A. D. 1902, of the circuit court of the United States, ninth circuit, northern district of California, held at the courtroom thereof in the city of San Francisco, on the 4th day of April, in the year of our Lord, one thousand nine hundred and two.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Order Allowing Writ of Error.

Upon motion of the defendant above named, and upon filing a petition for a writ of error and an assignment of errors herein.

It is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States circuit court of appeals for the ninth circuit, the judgment heretofore entered herein.

Dated this 4th day of April, 1902.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed April 4, 1902. Southard Hoffman, clerk.

28 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Order Fixing Amount of Bond and Supersedeas.

The defendant above named having this day filed his petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States circuit court of appeals in and for the ninth circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ

of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States circuit court of appeals in and for the ninth circuit, and said petition having this day been duly allowed:

Now, therefore, it is ordered that upon the said defendant filing with the clerk of this court a good and sufficient bond in the sum of $3,000, to the effect that if the said defendant and plaintiff in error, shall prosecute the said writ of error to effect, and
29 answer all damages and costs, if he fail to make his plea good, then then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the court that all proceedings in this court be, and the same are hereby, suspended and stayed until the determination of said writ of error by the said United States circuit court of appeals.

Dated this 4th day of April, 1902.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed April 4th, 1902. Southard Hoffman, clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, P. L. Flanigan, and The United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto the plaintiff above named in the sum of three thousand dollars ($3,000), to be paid to the said plaintiff, to which payment well and
30 truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated this 4th day of April, A. D. 1902.

Whereas, the above-named defendant has sued out a writ of error in the United States circuit court of appeals, in and for the ninth circuit, to reverse the judgment in the above-entitled cause by the circuit court of the United States, ninth circuit, northern district of California.

Now, therefore, the condition of this obligation is such that if the above-named defendant, P. L. Flanigan, shall prosecute said writ to effect and answer all costs and damages, if he shall fail to make

good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

P. L. FLANIGAN. [SEAL]
By J. C. CAMPBELL, *Attorney.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Corporate Seal.]

By its attorney in fact, JOHN H. ROBERTSON.

Whereas, the United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, has deposited with me its charter or articles of incorporation and the statement required by section 3 of an act of Congress
31 approved August 13, 1894, and entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act, that it has a paid up capital of not less than $250,000.00 in cash or its equivalent, and that it is able to keep and perform its contracts.

Now, therefore, the said United States Fidelity and Guaranty Company is hereby granted authority to do business under said act in said State of Maryland and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

HOLMES CONRAD,
Acting Attorney-General.

Department of Justice, Washington, D. C., September 25, 1896.

[DEPARTMENT SEAL.]

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Dec.* 7, 1901.

The annexed is a true copy of an original authorization to do business, issued by the Attorney-General, under the act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

[SEAL.] CECIL CLAY,
Chief Clerk.

32 *Statement of the United States Fidelity and Guaranty Company, Rendered to the Department of Justice, Washington, D. C.*

At the close of business, March 31st, 1902.

Commenced business August 1st, 1896.

Assets:

Investments, stocks and bonds (market value)	$1,326,479.85	
Cash on hand and in banks	398,335.42	
Collateral loans	570,894.00	
Real estate	130,629.58	
Loans secured by mortgages	22,000.00	
Mortgages and other collateral a/c salvage	14,599.61	
Advanced a/c contracts secured	37,958.99	
Agents' balances, Fidelity and Surety, less commissions	176,965.94	
Agents' balances, burglary, less commissions	29,277.91	
Due for subscriptions department of guaranteed attorneys	24,752.14	
Interest due and accrued	19,790.04	
		$2,751,683.48

33 Liabilities:

Capital stock paid in cash	$1,500,000.00	
Cash collateral deposits	148,087.38	
Surplus and reserve	1,103,596.10	
		$2,751,683.48

JOHN R. BLAND, *President.*

GEORGE R. CALLIS, *Secretary.*

STATE OF MARYLAND, *City of Baltimore,* } ss:

On this 7th day of April, 1902, before me, A. D. Patrick, a notary public in and for the city and State aforesaid, appeared John R. Bland and George R. Callis, president and secretary respectively, of the United States Fidelity and Guaranty Company, who, being by me severally duly sworn, did depose and say that they are such officers of the said company, and that the above and foregoing is a full, true and correct statement of the assets and liabilities of the said company, as they appeared upon the books of the said company on the 31st day of March, A. D. 1902.

In witness whereof, I have hereunto set my hand and official seal, the day and year aforesaid.

[NOTARIAL SEAL.] A. D. PATRICK,
Notary Public.

Form 400.

34 *Form of Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this 4th day of April, one thousand nine hundred —, before me personally came John H. Robertson, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of P. L. Flannigan, as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of San Francisco, State of California, that he is the attorney in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond (form —) of P. L. Flannigan, is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors
35 of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that John H. Robertson is the duly authorized agent and attorney of the said The United States Fidelity and Guaranty Company, to accept service of the process in the northern judicial district of the State of California, and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of one million five hundred thousand dollars ($1,500,000.00).

JOHN H. ROBERTSON.

Sworn to, acknowledged before me, and subscribed in my presence this 4th day of April, 1902.

W. B. HARDING,
Notary Public in and for the City and
[SEAL.] *County of San Francisco, Cal.*

(Endorsed:) The within bond is approved. Wm. W. Morrow, judge.

Filed April 5th, 1902.

SOUTHARD HOFFMAN, *Clerk,*
By W. B. BEAIZLEY, *Deputy Clerk.*

36 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant. } No. 12967.

Certificate to Record on Writ of Error.

I, Southard Hoffman, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing pages numbered from 1 to 34, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remain of record and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing transcript of record is $20.05; that said amount was paid by the defendant's attorneys, and that the original writ of error and citation issued herein are hereto annexed.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said circuit court, this 3d day of May, A. D. 1902.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

37 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the ninth circuit, northern district of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between P. L. Flanigan (defendant), plaintiff in error, and County of Sierra (plaintiff), defendant in error, a manifest error hath happened, to the great damage of the said P. L. Flanigan, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit,

together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 5th day of May next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein
38 to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of April, in the year of our Lord one thousand nine hundred and two.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

Allowed by:
WM. W. MORROW, *Judge.*

Service of within writ and receipt of a copy thereof is hereby admitted this 7th day of April, 1902.

FRANK R. WEHE,
Attorney for Plaintiff, Defendant in Error.

The answer of the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States circuit court of appeals for the ninth circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.
[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

39 (Endorsed:) No. 12,967. Circuit court of the United States, ninth circuit, northern district of California. P. L. Flanigan, plaintiff in error, *vs.* County of Sierra, defendant in error. Writ of error. Filed April 15th, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to County of Sierra, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on

the 5th day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, ninth circuit, northern district of California, in a certain action numbered 12,967, wherein P. L. Flanigan is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said P. L. Flanigan as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William W. Morrow, judge of the United States circuit court, ninth circuit, northern district of California, this 5th day of April, A. D. 1902.

WM. W. MORROW, *Judge.*

40 Service of within citation and receipt of a copy thereof is hereby admitted this 7th day of April, 1902.

FRANK R. WEHE,
Attorney for Plaintiff.

(Endorsed:) No. 12,967. Circuit court of the United States, ninth circuit, northern district of California. P. L. Flanigan, plaintiff in error, *vs.* County of Sierra, defendant in error. Citation. Filed April 15, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

(Endorsed:) No. 832. In the United States circuit court of appeals for the ninth circuit. P. L. Flanigan, plaintiff in error, *vs.* The County of Sierra, defendant in error. Transcript of record. Upon writ of error to the United States circuit court for the northern district of California. Filed May 5, 1902. F. D. Monckton, clerk.

40½ *Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

41 At a stated term to wit, the October term A. D. 1902, of the United States circuit court of appeals for the ninth circuit, held at the courtroom, in the city and county of San Francisco, on Tuesday, the fourteenth day of October, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Order of Submission.

Ordered, cause argued by A. E. Cheney, Esquire, counsel for the plaintiff in error, no one appearing for the defendant in error and

submitted to Gilbert and Ross, circuit judges, and Hawley district judge, for consideration and decision, with leave to counsel for the plaintiff in error to file brief within ten (10) days.

42 In the United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Opinion U. S. C. C. A.

Upon writ of error to the United States circuit court for the northern district of California.

A. E. Cheney and Campbell, Metson & Campbell for plaintiff in error.

Frank R. Wehe, district attorney Sierra county, for defendant in error.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

This action was brought by the county of Sierra in the State of California to recover of and from the plaintiff in error herein a license tax of two thousand five hundred dollars, it being alleged that the said plaintiff was engaged in that county in the business of sheep raising without having first paid the license tax required by ordinance number 54, passed by the board of supervisors of Sierra county, May 31, 1900. This ordinance consists of ten sections, which are set forth at length in the complaint. The first section reads as follows: "Each and every person, copartnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the county
43 of Sierra, State of California, must annually procure a license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm or corporation, and used in such business in said county." This ordinance went into effect June 15, 1900, and ten days thereafter this action was brought. At the time this ordinance was enacted, the board of supervisors of each county of California was authorized, subject to the restrictions and limitations imposed by the constitution and general laws, to license for the purposes of regulation and revenue, all and every kind of business carried on in the county. (Stat. Cal., 1897, 465.) On March 23, 1901, a new section was added to the Political Code of the State of California to

be known as section 3366, which repealed the authority of the board of supervisors to license for revenue. (Stats. Am. Code Cal., 1900, 1901, 635.)

The averments in the complaint are sufficient to entitle the county to recover provided the ordinance referred to is constitutional, in all respects valid, and of full force and effect so far as this case is concerned.

The defendant in the court below (plaintiff in error) interposed a demurrer to the complaint on the general ground "that said complaint does not state facts sufficient to constitute a cause of action." This demurrer was overruled "with leave to defendant to answer within twenty days." No answer being filed the court directed judgment to be entered in favor of the plaintiff, as prayed for
44 in the complaint. From this judgment a writ of error is brought to this court to have the alleged errors therein corrected. There are five assignments of error which counsel for plaintiff in error have conveniently grouped under three propositions, viz.:

"(1.) The ordinance in question is an unjust, discriminating, oppressive and unconstitutional exercise of the power to license for the purposes of revenue.

(2.) By the repeal of the statute authorizing boards of supervisors 'to license for purpose of regulation and revenue' and restricting their power to license 'in the exercise of their police powers and for the purposes of regulation as herein provided, and not otherwise,' without any saving clause in favor of pending suits or unpaid license taxes, the legislature of the State destroyed the cause of action which it had authorized the board of supervisors to create, denied any remedy for its enforcement and abated this action.

(3.) The ordinance is a revenue, not a regulation measure. As an ordinance for purpose of regulation, it is illegal and void, because it does not regulate, and the fee charged is so unreasonable that the courts will, as a matter of law, declare that its real purpose is revenue and not regulation, and therefore void as a pretended exercise of the police power."

In the consideration of the various questions raised in this case, it must be remembered that at the time of the passage of the ordinance herein involved, it was expressly authorized by the "Act to establish a uniform system of county and township governments," approved April 1, 1897. (Stat. 1897, sec. 25, p. 465.)
45 The validity of similar ordinances—where several constitutional and other objections were raised—has been frequently sustained by the supreme court of California.

In re Guerrero, 69 Cal. 88, 91;
Ex parte Mirande, 73 Cal. 365, 372;
County of El Dorado *vs.* Meiss, 100 Cal. 268;
County of Inyo *vs.* Erro, 119 Cal. 119;
County of Los Angeles *vs.* Eikenberry, 131 Cal. 461, 465, 466.

These decisions are binding upon this court, and will be followed regardless of the decisions, upon similar questions, in other States. (Williams *vs.* Gaylord, 102 Fed. 372, 374 and authorities there cited; *id.*, 186 U. S. 157, 167.) It is however claimed that the case in hand presents other objections that were not considered or decided in the decisions above referred to.

The statute of 1897, among other things, authorized the board of supervisors to pass ordinances "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county, * * * to fix the rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise."

In 1901 the legislature passed "An act to add a new section to the Political Code of the State of California, to be known as section 3366, relating to the powers of boards of supervisors, city councils, and town trustees, in their respective counties, cities and towns, and to impose a license tax," approved March 23, 1901. (Stat. and Amend. to Codes, 1901, 635.)

46 Section 3366 reads as follows: "Boards of supervisors of the counties of the State, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions, * * * to fix rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

The supreme court of California has held that section 3366 repeals, by implication, the prior act of 1897, in so far as the same relates to the power to collect a license tax for revenue, thus restricting the licensing power of boards of supervisors, under the act of 1897, to matters of regulation alone.

Ex parte Pfirrman, 134 Cal. 143, 147, 148;
City of Sonora *vs.* Curtin, 70 Pac. 674;
Town of Santa Monica *vs.* Guidinger, 70 Pac. 732.

What effect does this repealing act have upon the present action which was brought under the provisions of the law of 1897, before it was repealed?

Counsel for plaintiff in error contend, that inasmuch as the law under which the ordinance for revenue purposes was passed, has been repealed, the ordinance is repealed as to all such purposes, and must be regarded as if it never existed except for the purposes of those actions which were commenced, prosecuted and concluded while it was an existing law, and rely upon the rule announced in many authorities, that where the right and remedy is given by stat-

47 ute to bring a civil action for the collection of a license tax,

the repeal of the statute destroys the remedy unless the repealing statute contains a saving clause.

Spears *vs.* County of Modoc, 101 Cal. 303;
Anderson *vs.* Burns, 122 Cal. 273;
State Hospital *vs.* Flaherty, 134 Cal. 315;
Ball *vs.* Tolman, 135 Cal. 375;
City of Sonora *vs.* Curtin, 70 Pac. 674;
Sutherland Stat. Constr., secs. 162, 163, 166, and authorities there cited;
Endlich on Int. of Stats., secs. 478, 480.

This principle has been applied more frequently to penal statutes and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter, and in such cases the proceeding will be arrested at the very point where it is at the time of the repeal. (Spears *vs.* County of Modoc, *supra*) because: "The repeal of the law imposing the penalty is of itself a remission." (State *vs.* Railroad Co., 3 How. 534, 552, and authorities there cited.)

The ordinance under discussion was adopted May 31, 1900; it went into effect fifteen days thereafter. This action was commenced June 25, 1900. The amendment to the Code, section 3366, was approved March 23, 1901. The judgment in this case was entered March 7, 1902. Under these circumstances does it necessarily follow that because a saving clause was not inserted, the act of
48 1901 should be given a retrospective operation? Does this question not depend upon the circumstances and conditions of each particular act, its nature and character? In the present case the transaction between the parties, under the ordinance of 1900, was closed; nothing was left to be done except to collect the license due which was authorized by the law then in force. Upon the facts of this particular case can it be said that it was the intention of the legislature by the passage of the act of 1901 to annihilate the cause of action provided for in the act of 1897, and terminate all pending suits for its enforcement, or was it simply to take away the power of the board of supervisors in the future to license for revenue only?

In The City of Oakland *vs.* Whipple, 44 Cal. 303, 305, which was an action for the recovery of a delinquent tax which was levied for the year 1869, and the action for its collection was commenced January 17, 1870, it was argued that the law under which said action was commenced was repealed after service of summons and before judgment; and it was there, as here, contended that the act passed in 1870 repealed all prior acts so far as they conflicted with that act, and that the plaintiff was left without any cause of action, and was not thereafter entitled to maintain an action for the collection of a tax theretofore levied. The court said "To hold that the act (of 1870) was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the

legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the constitution, would not be inferred, but must be made apparent by clear and unequivocal language. That construction is not necessary in order to give full effect to the act, and, in our opinion, it was not intended that the act should have a retrospective operation; but the intent was that the taxes then due should be collected according to the law then in force."

In The Town of Belvidere *vs.* Railroad Co., 34 N. J. L. 193, 195, where an act authorizing the levying of a certain tax on the capital stock of the defendant was repealed after an assessment of the tax, but before its collection, it was held that the repeal did not prevent the collection of such tax, its collection being regulated by the general tax law, which had not been repealed. In the course of the opinion the court said: "The general legal rule, as found in Dwar. on Stat. 676, is referred to, viz., 'That when an act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed.' But even if we accept this definition as strictly correct in its application to every case, still it is not perceived how, by force of it, the present tax is to be avoided. The case seems to fall within the exception contained in the rule as just quoted. The assessment of this tax closed and ended the transaction, so far as the act of 1862 was concerned. That act authorized the assessment, and appointed the mode of making it, but it had nothing to do with its collection, which was and is altogether regulated by other acts. When, therefore, this assessment was made, the force of the act of 1862 was, with respect to it, wholly spent and exhausted; the thing authorized to be done was completely done, and the consequence is, that even on the most stringent application of the rule as claimed, a repeal of the statute cannot invalidate a proceeding that was fully perfected while such statute continued in force. * * * As a question of intention, it is certainly very improbable that the legislature in 1866, by the repeal of the act of 1862, intended to annul assessments which had been made under the latter act, and which remained uncollected by reason of litigation, or from any other cause. Such a supposition would be most unreasonable. * * * As the tax now in controversy was assessed during the existence of the act of 1862, and as the proceedings for its collection do not depend on that act, my conclusion is, that the subsequent repeal of that statute cannot, on general principles, invalidate such assessment."

See, also, Dodge *vs.* National Bank, 109 Fed. 726, 731, and authorities there cited.

The defendant in error contends that the license fee or tax, after the preliminary steps taken for its collection, became a debt (and it is so expressly declared to be in the ordinance in question); and that it had a vested right to collect the same. It has frequently been held that a direct tax duly assessed and levied upon real or

personal property, is not a debt within the broad meaning of that term. But a license fee or tax does not stand upon the same plane. It is true that a vested right is usually based upon contracts, but it may also be based upon transactions in the nature of a contract.

In Sutherland on Stat. Const. sec. 164, the author said:
51 "When a right has arisen on a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right which stands independently of the statute."

The same rule is laid down by the Supreme Court of the United States in Steamship Co. *vs.* Joliffe, 2 Wall. 450, 455, where a pilot licensed under a statute had tendered his services to pilot a vessel out of port, and such services were refused, the court held that his claim to the half pilotage fees, allowed by the statute in such cases became perfect, and that the subsequent repeal of the statute did not affect the judgment rendered in an action brought to recover his claim. In the course of the opinion the court said: "The transaction * * * between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract. The absence of assent on the part of the master or owner of the vessel did not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. * * * In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one; and the liability thus arising is said to be a liability upon an implied contract."

In the present case the plaintiff in error did not directly
52 promise to pay the license tax demanded by the defendant in error, but he herded and grazed his sheep in Sierra county when the law for the imposition and collection of the license tax was in full force and effect. He reaped the full benefit of the law, and then refused to comply with it. Do not these facts virtually bring this case within the rule announced in the Joliffe case?

Similar principles are announced in United States *vs.* Williams, 8 Mont. 85, 90, where the defendant sought to avail himself of the repeal of the regulations by the Secretary of the Interior forbidding the cutting of timber on the public land. In the course of the opinion the court said: "The question then arises, What were the rights of the United States in relation to this timber? * * * The timber had been unlawfully cut and converted and the right of the United States to receive compensation for its property completely vested. What effect, then, did the subsequent revocation of these rules and regulations, touching the cutting of such timber, have upon this right? We take it that the modification of the rule is analogous to the repeal of the statute, and that its effect must be

determined by the rules of law, governing the repeal of the statute under which the alleged right had arisen, and which was being prosecuted in the courts, but still had not been reduced to a judgment."

After referring to the general rule, the court said: "But there are certain exceptions to this general rule. Where trouble and expense may have been incurred, and suits may have been instituted, the effect of a retrospective construction of repealing statutes is entirely to derange the plans and defeat the arrangements of parties
53 who have proceeded on the faith of antecedent legislation, and an effort has been made to arrest these results and certain exceptions have been made to this retroactive legislation. Where, then, a right in the nature of a contract has vested under the original statute, then the repeal does not disturb it." The court then states and approves the rule in the case of Steamship Co. *vs.* Joliffe, *supra*, and adds: "While the action in the present case cannot be said to be one of contract, but an action of tort for the wrongful cutting and conversion of the timber of the plaintiff, it is hard to imagine a distinction between the right to recover for trees cut and converted wrongfully, and money due for their delivery under contract. If the right is vested in the one case, it seems to us it is equally as clearly vested in the other. Indeed, the timber when cut may be deemed personalty, and the plaintiff might waive the tort, and sue for it in assumpsit as so many cords of wood sold and delivered. It seems to us, then, that the plaintiff's right in this case comes within the exceptions to the general rule already stated, by which the right of action is defeated upon the repeal of the law under which it was brought."

The views already expressed are conclusive of the case, and render it unnecessary to consider other questions elaborately argued by counsel. The judgment of the circuit court is affirmed, with costs.

(Endorsed): Opinion. Filed March 4, 1903. F. D. Monckton, clerk.

54 United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Judgment.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed, with costs.

(Endorsed): Judgment. Filed and entered March 4, 1903. F. Monckton, clerk.

55 At a stated term, to wit, the October term A. D. 1902, of the United States circuit court of appeals for the ninth circuit, held at the courtroom, in the city and county of San Francisco, on Wednesday, the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and three.

Present: The Honorable William B. Gilbert, circuit judge; Honorable William W. Morrow, circuit judge; Honorable Thomas P. Hawley, district judge.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Order Denying Petition for a Rehearing.

Ordered, petition for a rehearing, heretofore filed herein, denied.

56 United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing fifty-five (55) pages, numbered from one (1) to fifty-five (55) inclusive, to be a true copy of the record and of all proceedings had in the above-entitled case in the said the United States circuit court of appeals for the ninth circuit as the same remain of record in my office.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 29th day of July, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

57 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which P. L. Flanigan is plaintiff in error and The County of Sierra is defendant in error which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the northern district of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
58 States, do hereby command you that you send without delay to the Supreme Court, as aforesaid, the record and proceedings in said cause, so that the Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

59 [Endorsed:] File No. 19,077. Supreme Court of the United States. No. 426, October term, 1903. P. L. Flanigan *vs.* The County of Sierra. D. No. 832. United States circuit court of appeals for the ninth circuit. Writ of certiorari. Filed Oct. 26, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

60 In the United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Stipulation that Record Filed in Supreme Court be Taken as Return to Writ of Certiorari.

Whereas, heretofore the plaintiff in error above-named filed in the Supreme Court of the United States his petition for a writ of certiorari requiring the above entitled court to certify to the said Supreme Court for its review and determination the above entitled cause,

And whereas, together with said petition said plaintiff in error filed in said Supreme Court a certified transcript of the record of the said cause and of the proceedings had therein in the said circuit court of appeals, and in the circuit court of the United States, for the ninth circuit, northern district of California,

And whereas, upon said petition a writ of certiorari according to the prayer of said petition issued out of and under the seal of said Supreme Court to the judges of said circuit court of appeals,

Now, therefore, be it and it is hereby stipulated by and between counsel for the respective parties hereto that the said tran-
61 script may be taken as and for a return to said writ.

Dated this 28th day of October, 1903.

A. E. CHENEY,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Plaintiff in Error.
FRANK R. WEHE,
Attorney for Defendant in Error.

(Endorsed:) Stipulation that record filed in Supreme Court be taken as return to writ of certiorari. Filed Nov. 4, 1903, F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals, for the ninth circuit, do hereby certify the foregoing to be a full, true and correct copy of "stipulation that record filed in Supreme Court be taken as return to writ of certiorari," filed on the 4th day of November, 1903, in the foregoing entitled cause as the original thereof remains of record in my office.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, California, this 18th day of November, A. D., 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

62 United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Return to Writ of Certiorari.

By direction of the judges of the United States circuit court of appeals for the ninth circuit, I, Frank D. Monckton, clerk, in obedience to the annexed writ of certiorari issued out of the honorable the Supreme Court of the United States and addressed to the honorable the judges of the United States circuit court of appeals for the

ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedidgs in the above entitled cause, do attach to the said writ a certified copy of a stipulation entered into between the counsel for the respective parties to the said cause on the 28th day of October, 1903, the original of which stipulation is of record in my office and do hereby certify the same as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 18th day of November, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

63 [Endorsed:] File No. 19,077. Supreme Court U. S., October term, 1904. Term No. 121. P. L. Flanigan, petitioner, *vs.* The County of Sierra. Writ of certiorari and return. Filed Nov. 27", 1903.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

P. L. FLANIGAN,
Petitioner,

vs.

THE COUNTY OF SIERRA,
Respondent.

Petition for a Writ of Certiorari requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court for its Review and Determination that Certain Cause Entitled "P. L. Flanigan, Plaintiff in Error, vs. The County of Sierra, Defendant in Error."

To the Honorable the Supreme Court of the United States:

The petition of P. L. Flanigan respectfully shows unto this Honorable Court as follows:

The respondent is a county of the State of California and is a body politic and corporate under the laws thereof.

During the month of May, 1900, under and by virtue of that certain act entitled "An Act to estab- "lish a uniform system of county and township gov- "ernments." (Cal. Stats., 1897, Ch. CCLXXVII), commonly known as "The County Government Act," the Board of Supervisors of that county had power "To license for regulation and revenue, all and every "kind of business not prohibited by law, and trans- "acted and carried on in such county, and all shows, "exhibitions, and lawful games carried on therein, "to fix the rates of license tax upon the same, and "to provide for the collection of the same, by suit "or otherwise." (Sec. 25, subd. 25).

Upon the 31st day of May, 1900, the Board of Supervisors duly enacted an ordinance which is in part as follows:

"Section 1. Each and every person, copartner- "ship, firm or corporation, engaged in the business "of raising, grazing, herding and pasturing sheep "in the County of Sierra, State of California, must "annually procure a license therefor from the "License Collector, and must pay therefor the sum "of ten (10) cents for each sheep or lamb owned by, "in the possession of, or under the control of such "person, co-partnership, firm or corporation, and "used in such business in said county.

"Section 2. Each and every person, co-partner- "ship, firm or corporation who may engage in the "business of raising, grazing, herding or pasturing

"sheep within the County of Sierra, State of Cali-
"fornia, in order to procure a license therefor, must
"present to the License Collector of said county, at
"the time of making application therefor, the affi-
"davit of such owner, his foreman, agent or person
"in charge of such sheep owned by and in the pos-
"session of and under the control of such applicant
"for license within said county, and upon presenting
"such affidavit and the payment of the license tax,
"as prescribed in Section 1 of this ordinance, the
"applicant shall be granted a license to raise, graze,
"herd or pasture sheep within the said County of
"Sierra. * * *

"Section 4. All licenses to be collected under
"this ordinance are payable annually, and shall be-
"come due and payable in advance at the office of
"the License Collector, and if any license is not paid
"within fifteen days after the commencement of said
"business an additional tax of ten per cent is hereby
"added, to be collected with the original
"amount. * * *

"Section 7. The amount of the license tax fixed
"by this ordinance for the transaction or carrying
"on any business named herein shall be deemed a
"debt due to the County of Sierra, and if any per-
"son fails, neglects or refuses to take out and procure
"a license issued under the provisions and in the
"manner provided in this ordinance, the said License
"Collector shall direct the District Attorney of said

"county to bring suit in the name of the County of "Sierra for the recovery of such license * * * "and in case of recovery by the plaintiff fifty dollars "damages and costs must be added to the judgment "to be collected from the defendant.

"Section 8. The License Collector shall issue "licenses for the year in which said license is pro- "cured and out of each license collected by him he "may retain for his fee therefor the sum of 10 per "cent thereof which said fee shall belong to "him. * * *

"Section 10. All money collected for licenses "under the provisions of this ordinance, less said fee "of 10 per cent, shall be paid over to the County "Treasurer, as other moneys are and be placed to "the credit of the general funds of the county."

Your petitioner is a citizen of the State of Nevada, and during the months of May and June of the year 1900 was engaged in the business of raising, grazing, herding and pasturing sheep in the county of Sierra, and had in his possession and under his control some 25,000 sheep.

Your petitioner did not procure a license and did not pay the tax, as required by that ordinance.

An action under and by the authority of that ordinance, to recover the sum of $2,500 the amount of such unpaid tax and for the additional sum of $50 by way of damages was commenced upon the 25th day of June, 1900, in the Superior Court of the State

of California, in and for the County of Sierra, by the respondent against your petitioner.

Thereupon the respondent filed a complaint in said action alleging the matters and things hereinbefore recited and praying for judgment in the amount of said sums and for its costs.

Upon the 8th day of August, 1900, an order was duly made and entered removing such cause into the United States Circuit Court, Ninth Circuit, Northern District of California.

Thereafter, and on the 16th day of August, 1900, your petitioner filed a demurrer to said complaint in said Circuit Court averring that said complaint did not state facts sufficient to constitute a cause of action against your petitioner.

Your petitioner further shows that by an act of the Legislature of the State of California, approved on the 23d day of March, 1901, (Cal. Stats., 1900, Chap. CCIX, p. 635) there was added to the Political Code of the State of California a new section numbered 3366, which provided as follows:

"Boards of Supervisors of the counties of the "State, and the legislative bodies of the incorpo- "rated cities and towns therein, shall, in the exer- "cise of their police powers, and *for the purpose of* "*regulation,* as herein provided, *and not otherwise,* "have power to license all and every kind of busi- "ness not prohibited by law, and transacted and "carried on within the limits of their respective

"jurisdictions, and all shows, exhibitions and law-
"ful games carried on therein, to fix the rates of
"license tax upon the same, and to provide for the
"collection of the same by suit or otherwise."

Thereafter upon the argument of the demurrer to the complaint it was contended on behalf of your petitioner that by reason of the repeal effected by the act of 1901, of the power to license for revenue conferred upon Boards of Supervisors by the County Government Act, the respondent could not maintain its action. But upon the 25th day of November, 1901, the Circuit Court overruled the demurrer with leave of your petitioner to answer within twenty days. Your petitioner did not so answer and upon the 7th day of March, 1902, judgment by default was entered against your petitioner and in favor of the respondent as prayed for in the complaint.

Thereafter, and upon the 4th day of April, 1902, your petitioner upon filing his assignment of errors in this cause petitioned the Circuit Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the Ninth Circuit and thereupon such order was made and entered in and by the Circuit Court.

Thereafter upon the 5th day of May, 1902, such writ of error issued to the judges of said Circuit Court and pursuant thereunto the record and all proceedings had in said cause were duly certified

under the seal of said Circuit Court unto the Circuit Court of Appeals for the Ninth Circuit.

Thereafter upon the 14th day of October, 1902, the said writ of error came on regularly for hearing and determination in and by said Circuit Court of Appeals and was submitted for its decision and upon the 4th day of March, 1903, said Circuit Court of Appeals duly gave, rendered and filed its decision and judgment thereon affirming the judgment of the Circuit Court.

Within due time thereafter your petitioner made and filed in said Circuit Court of Appeals a petition for a rehearing of said writ of error and upon the 27th day of May, 1903, said Circuit Court of Appeals duly made and entered its order denying such petition.

And now your petitioner respectfully shows and submits unto this honorable Court the following reasons why he deems himself aggrieved by the judgment of said Circuit Court of Appeals and why a writ of certiorari should issue out of this Court to review said judgment:

That this is a case of "peculiar gravity and gen-"eral importance" in which this Court has said that the writ of certiorari will issue (*American Construction Company* vs. *Jacksonville Railway,* 148 U. S., 372, 83) is apparent, for its decision affects the revenues of the counties of the entire State and the obligations of the public, engaged in certain

classes of business to the counties. It affects the power of the State in its regulation of the counties.

And furthermore, as will be hereafter shown, there is a square and irreconcilable conflict between this decision and the decisions of the State Supreme Court upon an identical question, the mere suggestion of which has always been considered sufficient to invoke the extraordinary assistance of this Court by writ of certiorari; for since a lack of uniformity in the decisions of these tribunals must necessarily produce great doubt, there is no function of this Court of more importance than that of harmonizing such conflicts. And this is especially true in the case at bar, for if the judgment therein be allowed to stand, the county may by the process of a Federal Court, in cases where said Court has jurisdiction, enforce the payment of a claim, when, as will be shown, the State, from which the county derives its being, functions and powers, has denied it the assistance of its Courts or process to enforce such claim. The case at bar involves a question of State polity, of local regulation and the power of taxation for governmental purposes. Its facts in a peculiar manner emphasize the confusion which must necessarily arise if the decision be allowed to stand beside those of the State Court.

As was said in *Forsyth* vs. *Hammond* (166 U. S., 506). "We reaffirm in this case the proposition "heretofore announced, to wit, that the power this

"Court in certiorari extends to every case pending "in the Circuit Court of Appeals, and may be exer- "cised at any time during said pendency, provided "the case is one, which but for this provision of the "statute would be fully determined in that Court. "And further, that while this power is coextensive "with all possible necessities and sufficient to secure "in this Court a final control over the litigation in "all the Courts of Appeal, it is a power which will "be sparingly exercised, and only where the circum- "stances of the case satisfy us that the importance "of the question involved, the necessity of avoid- "ing conflict between two or more Courts of "Appeal and the Courts of a State or some mat- "ter affecting the interests of this nation in its in- "ternal or external relations demands such exer- "cise."

And your petitioner further shows wherein a conflict exists between the decisions of the Supreme Court of the State of California, and the decision of the Circuit Court of Appeals in the case at bar.

The Supreme Court of the State of California in "*Ex parte Pfirrmann*" (134 Cal. 143) in its opinion filed upon the 11th day of September, 1901, say in part: "Prior to the act of 1901, Boards of Super- "visors, by virtue of subdivision 25 of Section 25 of "the County Government Act, possessed the power "to collect a license tax for revenue in all parts of "the county. But the act of 1901 must be held to

" repeal by implication, the power thus granted. The " later act provides: 'Boards of Supervis- " 'ors * * * * shall in the exercise of their " ' police powers, and for the purpose of regulation, " ' as herein provided, and not otherwise, have power " ' to license all and every kind of business,' etc. " This language is too plain to be construed. It " speaks for itself, and declares that Boards of Su- " pervisors may issue licenses for the purposes of " regulation alone. The words ' not otherwise' cur- " tail and cut off all power Boards of Supervisors " theretofore had to issue licenses and charge there- " for as a revenue measure."

The ordinance by its very terms is a revenue, not a regulatory measure. The moneys derived from the license tax are not used for the purpose of regulating or policing the business licensed, but, less the 10 per cent deducted as the collector's fee, *" shall be paid " over to the County Treasury, as other moneys are, " and be placed to the credit of the general fund of " the county."*

In an Ohio case the Court say: "A license may " include a tax, or it may not. If the exaction goes "no further than to cover the necessary expenses of " issuing it, it does not, *but if it is made a means of " supplying money for the public treasury * * * " that it is a tax is too palable for discussion."*

Mays vs. *Cincinnati,* 1 Ohio St., 268.

The Circuit Court for the Eastern District of North Carolina say: "Defendants contend that this "taxation can be sustained as a part of the police "power of the State * * * If the legislation "in question can properly be referred to that power, "it will be because the right to pass inspection laws "may be deemed to have its foundation in the police "power of a State. Certainly if it be anything but "what the act itself seems to contemplate—a tax on "an occupation, or a privilege tax—it is because it "is used to secure an inspection of commercial fer-"tilizers before they can be sold in North Carolina. "Such a tax would be constitutional only within the "limits of the Constitution. It cannot be sustained "where evidently in excess of what is required for "such purpose, *and when the proceeds are applied to "other uses.*"

American Fertilizing Co. vs. *Board of Agriculture,* 43 Fed., 609.

See, also,

Flanigan vs. *Plainfield,* 44 N. J. L., 118.

Cooley on Taxation, 597.

That the purpose of this ordinance is to provide revenue for the county in the same manner as the ordinary tax levy, to be paid into the county treasury "as other moneys are," and to be expended for the general purposes of the county, is too palpable to admit of discussion; and on the other hand in no man-

ner does it regulate, even incidentally the business which it purports to license.

The Supreme Court of Utah in construing an almost identical ordinance say: "The ordinance does "not even contain a hint as to regulation of the busi- "ness, nor that the business requires any regulation, "nor that the county will afford protection of any "kind to the person engaged in the business, nor that "it is of such a character as to require regulation or "protection. The business may be conducted by "those engaged therein where and how they will. "No intention to regulate it is manifest from the "context or otherwise. This ordinance imposes no "restrictions as to the manner the business shall be "carried on, and grants no lawful privilege that was "not previously enjoyed."

Cache County vs. *Jensen,* 61 Pac., 303.

The Supreme Court of California has said in reference to an ordinance of similar character: "By "its very terms the ordinance is a revenue measure, "and this suit is simply a civil action to recover a "liability alleged to have been incurred by the de- "fendants by virtue of the provisions of the ordi- "nance, and the collection of a tax does not come "within the exercise of police power as a prohibitory "measure. That power is exercised in the enforce- "ment of a penalty prescribed for a non-compliance "with the law, or for the doing of some prohibited

"act. As the county has chosen by this ordinance "to require a license tax for engaging in certain "kinds of business, and that this tax shall be col- "lected by a suit, and has fixed no penalty for en- "gaging in the business, the ordinance is not to be "regarded as the exercise of its police power, but "rather as its desire to regulate the business and de- "rive a revenue therefrom."

Merced County vs. *Helm,* 102 Cal., 159, 163.

In Colorado the Court say: "While a license tax "may be levied upon such business or occupation "as are proper subjects of municipal regulation and "control, and the purpose of such tax is for regula- "tion or restraint, yet, when all the elements of regu- "lation or restraint are wanting, and the primary "purpose of the act is the raising of revenue only, "then it loses its character as a license tax, and be- "comes a tax for revenue. 'Only those cases where "'regulation is the primary purpose can be specially "'referred to the police power.' (Cooley on Tax- "ation, 397). For this reason the act under consid- "eration cannot be upheld as a legitimate exercise "of police power."

Kiowa County vs. *Dunn,* 40 Pac., 357.

And furthermore, it must be apparent that the word "license" as used in the title and body of this ordinance has in itself no virtue to give a regulatory

effect thereto. A license is a privilege to do an act or carry on a pursuit, the performance or transaction of which is forbidden without such special permission.

"A license is a right granted by some competent "authority to do an act which, without such author- "ity, would be illegal."

Cooley on Taxation, 573.

"A license confers a privilege, and makes the doing "of something legal, which, if done without it, "would be illegal."

Mayor vs. *Charlton,* 36 Ga., 460, 462.

"A license in its proper sense is a permit to do "business which could not be done without the "license."

Sonora vs. *Curtin,* 137 Cal., 583.

See, also:

Insurance Co. vs. *Augusta,* 50 Ga., 530, 537.
Burch vs. *Savannah,* 42 Ga., 596, 598.
Chilvers vs. *People,* 11 Mich., 43.
Robinson vs. *Mayor,* 1 Hump., 156.
Ould vs. *Richmond,* 23 Grat., 464.
Reed vs. *Beall,* 42 Miss., 472.

The so-called "license" of the ordinance when so tested is no license. It is but a tax receipt, and the so-called "license tax" merely a revenue tax. For

the ordinance does not forbid or make illegal the carrying on of the business mentioned unless a license be procured; it does not require that a license be procured as a prerequisite to lawfully engaging in the business. Its only provision is that sheepmen "engaged in the business" shall pay an annual tax and procure a "license" and if they fail to do so, the amount of the tax, with certain added penalties, shall be a debt due the county. This tax is to be collected by a civil suit, and when recovered the defendant has a perfect right to continue in the business whether or not he procures the "license" mentioned in Section one. The permission which is the very essential and synonym of license, is not a prerequisite to engaging in the business; the only demand of the county is that the tax shall be paid. The effect of the ordinance is not otherwise than if it had provided that all sheep owned by those engaged in this business, should be taxed ten cents a head; that upon the payment of the tax the owner should be entitled to a tax receipt evidencing such payment, and that if it were not paid, it should become a debt due the county to be collected by a civil suit. Calling the tax receipt a "license" and the tax a "license tax" does not confine the lawful authority to transact this business to those who have paid the tax and procured the "license" any more than an ordinary tax on property creates a right or authority to own prop-

erty. A license is a police regulation controlling the exercise of a profession, business or occupation.

As was said in *Cache County* vs. *Jensen, (supra)* "License, in common parlance, implies permission "to do something which may not be done without "a license. * * * A mere tax imposed upon a "business or occupation therefore, is not a license or "privilege as to the business which would not other-"wise exist. * * * Evidently the efforts of the "Board resulted not in the imposition of a license "upon a business, but in the levy of an unequal and "unjust tax upon property. The thing provided for "by this instrument is not a license * * * but "by design a prohibitive tax."

In *Mayor* vs. *Second Avenue R. R.,* (32 N. Y., 261) the Court say: "Regulations of police are "regulations of internal or domestic government for-"bidding some things and enjoining the perform-"ance of others for the security and protection and "to promote the happiness of the governed. The "only act enjoined by the ordinance in question is "the payment of the fifty dollars, and the only act "which it forbids and prohibits is the running of the "cars without the payment of the money. If the "Legislature should by law require every head of "a family throughout the State to pay to the collec-"tor the sum of twenty dollars, and take his receipt "therefor, it would be a fiscal measure, an ex-"pedient to replenish the treasury, not a regulation

"of police prescribing a rule of action and conduct. "So with this ordinance, call what it requires by the "name of license, or certificate of payment, or any- "thing else; its primary and indeed only purpose is "to take from the company under coercion of the "penalty which it imposes, the sum of fifty dollars "annually for each car run upon the road, for the "benefit of the city.

"The certificate which the company is to receive "upon payment being made is called a license in the "ordinance.* * * It is vain, therefore, to speak "of it or treat it as a license, or a regulation of "police. It is the imposition of an annual tax upon "the company."

Since, then, this ordinance was enacted solely as a revenue measure and since under the law of California as it stands to-day, the Board of Supervisors of the county respondent is divested of authority to enact the ordinance and it stands repealed, the question is presented: What is the effect of the repeal upon the right of the county to maintain this action instituted before the repeal? The Supreme Court of California, the Court of last resort, has directly passed upon this question in two cases decided before the decision of the Circuit Court of Appeals in this cause.

In *City of Sonora* vs. *Curtin,* 137 Cal., 583, that Court decided although under the terms of the ordinance of that city, a license tax was due and payable,

before the enactment of the repealing act, and nothing was left to be done except to collect the same, that the repealing act abrogated the right of collection.

In that case the Trustees of the City of Sonora had passed an ordinance on June 4, 1900, providing that any person engaged in any pursuit therein named, should obtain a license therefor; that attorneys-at-law should pay three dollars per quarter, and that "the license imposed thereunder" should be deemed a debt due the city payable in advance, and if such license should not be paid it might be recovered in a civil action, with an additional penalty of ten dollars.

The Court in part say: "Defendant was at the "time of the passage of the ordinance, an attorney at "law, admitted and licensed to practice in all the "Courts of the State, and he was then engaged, and "continued thereafter to be engaged in the practice "of law in the City of Sonora within the territory "covered by said ordinance. He neglected and re-"fused to procure a license under said ordinance, or "to pay the license tax imposed by its terms.

"Plaintiff is a municipal corporation of the sixth "class incorporated under an Act of the Legis-"lature entitled, 'An Act to provide for the "'organization, incorporation, and government "'of municipal corporations,' approved March "13, 1883 (Stats., 1883, p. 93). The author-

"ity for passing the ordinance is claimed un-
"der subdivision 10 of Section 852 of the Act, which
"was in force at the time of its passage, and which
"provides that Boards of Trustees of Municipal
"Corporations of the sixth class shall have power
"'to license for purposes of regulation and revenue,
"'and every kind of business authorized by law and
"'transacted or carried on in such city or town
"'* * * to fix the rates of license tax upon the
"'same, and to provide for the collection of the
"'same by suit or otherwise.' If it be conceded that
"the practice of law is a 'business authorized by law
"'and transacted or carried on in such city or town,'
"within the meaning of the statute, and that the pro-
"vision, 'Every attorney at law shall pay a license
"'of three dollars a quarter,' is a provision for a
"license tax upon the business of practicing law, and
"not upon the person because he is an attorney at
"law, is it a license tax imposed for the purpose of
"revenue, or is it a regulation under the police
"powers of the town? It is well settled that a busi-
"ness or occupation may be taxed, under authority
"to tax for the purposes of revenue, and in such cases
"the tax is properly a license tax. A license in its
"proper sense is a permit to do business which could
"not be done without the license. It is evident that
"the license tax imposed by the ordinance in ques-
"tion is not a license in the sense of a permit to de-
"fendant to practice law, because he already has a

"license, and has paid the fee therefor, which per-
"mits him to practice law. Although a business,
"occupation or profession may be thus licensed, by
"having a license issued which permits the business
"to be carried on, still it may under a proper
"statute, be subject to an additional license tax. Now
"the defendant here having obtained his license,
"which permits him to practice law, the ordinance
"in question could not take away that license or per-
"mit because of the refusal to pay the license tax.
"The ordinance, therefore, plainly by its terms im-
"posed the charge as a license tax. It is called in
"the ordinance a license tax, and it is therein said
"the license tax shall be deemed a sum due the city.
"The tax was not imposed as a police regulation. A
"police regulation or restraint is for the purpose of
"preventing damage to the public or to third per-
"sons. * * *

"The Board of Trustees of a city * * * can-
"not in any way or manner regulate the business or
"profession of practicing law. If it possessed any
"power to pass the ordinance in question it was un-
"der the power to license for the purposes of rev-
"enue. Since the ordinance was passed, the Legis-
"lature, by an Act approved March 23, 1901,
"(Statutes and Amendments to the Codes, 1901, p.
"635), added Section 3366 to the Political Code,
"which so far as material here, is as follows:
"'Boards of Supervisors of the counties of this State,

"'and the legislative bodies of the incorporated cit-
"'ies and towns therein, shall, in the exercise of their
"'police powers, and for the purposes of regulation,
"'as herein provided, and not otherwise, have power
"'to license all and every kind of business not pro-
"'hibited by law, and transacted and carried on
"'within the limits of their respective jurisdic-
"'tions * * * to fix the rates of license tax
"'upon the same, and to provide for the collection
"'of the same by suit or otherwise' * * *

"The section of the act of 1883 herein quoted giv-
"ing to the Board of Trustees power to license for
"purposes of revenue is repealed by implication by
"said Section 3366 of the Political Code. It de-
"clares and limits the power of the Board to license
"for the purpose of regulation in the exercise of
"their police powers. The words 'not otherwise'
"are used to emphasize the meaning of the sec-
"tion. * * *

"The action is not to recover upon any contract
"obligation. If recovery can be had, it is upon the
"theory that defendant has violated the law. The
"violation of the law is measured in dollars, and the
"amount for its violation is authorized to be recov-
"ered in a civil action. The defendant does not owe
"for any license, because he refused to take out a li-
"cense. The recovery is sought for his refusal. The
"authority under which the ordinance for revenue
"purposes was passed being repealed, the ordinance

" is repealed as to all such purposes, and must be re-
" garded as if it never existed, except for the pur-
" poses of those actions which were commenced,
" prosecuted and concluded while it was an existing
" law.

" The ordinance here in question provided that
" the three dollars ' together with the sum of ten
" ' dollars thereto added after the expiration of said
" ' ten days, shall become in each and every instance
" ' of delinquency, as aforesaid, the license tax as im-
" ' posed by this ordinance.'

" The right is given by the ordinance to bring a
" civil suit to recover the amount so made a license
" tax. The civil remedy was created by the ordi-
" nance, and the remedy is repealed by the repeal of
" the ordinance as to revenue. * * *

" The right given the plaintiff in this case, being
" penal in its nature, and the remedy created solely by
"statute, its enforcement is dependent on the statute
" alone. It is still inchoate and not reduced to pos-
" session nor perfected by final judgment. In such
" case the repeal of the statute destroys the remedy,
" unless the repealing statute contains a saving
" clause. * * * There is no saving clause in
" Section 3366 of the Political Code."

And again in *Santa Monica* vs. *Guidinger* (137 Cal., 658) the Court say: " From the title of the
" ordinance, the absence of regulatory provisions, the
" amounts of the several taxes imposed, and the na-

"ture of the particular subject of taxation involved "here, it is clear that the license tax in question was "imposed for the purpose of raising revenue. The "case is therefore substantially similar to that of the "*City of Sonora* vs. *Curtin* (*ante* p. 583), just de- "cided, and it must therefore be held on the author- "ity of the decision in that case that the license tax "in question was repealed, and the right of action "therefor extinguished by Section 3366 of the Polit- "ical Code."

But the Circuit Court of Appeals decided in diametric opposition to the Supreme Court of California, as to the effect of the enactment of the repealing act, upon the pending action. They say in part:

"*The Supreme Court of California has held that "Section 3366 repeals, by implication, the prior act "of 1897, in so far as the same relates to the power "to collect a license tax for revenue, thus restrict- "ing the licensing power of Boards of Supervisors, "under the act of 1897, to matters of regulation "alone.* (*Ex parte Pfirrmann*, 134 Cal., 143, 147-8; "*City of Sonora* vs *Curtin*, 70 Pac., 674; *Town of "Santa Monica* vs. *Guidinger*, 70 Pac., 732.)

"What effect does this repealing act have upon "the present action which was brought under the "provisions of the law of 1897, before it was re- "pealed?

"Counsel for plaintiff in error contend, that in- "asmuch the law under which the ordinance for

" revenue purposes was passed, has been repealed,
" the ordinance is repealed as to all such purposes,
" and must be regarded as if it never existed except
" for the purposes of those actions which were com-
" menced, prosecuted and concluded while it was ex-
" isting law, and rely upon *the rule announced in*
" *many authorities, that where the right and remedy*
" *is given by statute to bring a civil action for the*
" *collection of a license tax, the repeal of the statute*
" *destroys the remedy unless the repealing statute*
" *contains a saving clause.* * * *

" This principle has been applied more frequently
" to penal statutes and it may be regarded as an es-
" tablished rule that the repeal of a penal statute
" without any saving clause has the effect to deprive
" the Court in which any prosecution under the
" statute is pending of all power to proceed further
" in the matter, and in such cases the proceeding
" will be arrested at the very point where it is at the
" time of the repeal, because: 'The repeal of the
" 'law imposing the penalty is of itself a remis-
" 'sion.'

" The ordinance under discussion was adopted
" May 31, 1900; it went into effect fifteen days there-
" after. This action was commenced June 25, 1900.
" The amendment to the Code, Section 3366, was
" approved March 23, 1901. The judgment in this
" case was entered March 7, 1902. Under these cir-
" cumstances does it necessarily follow that because

"a saving clause was not inserted, the act of 1901 "should be given a 'retrospective operation?' Does "this question not depend upon the circumstances "and conditions of each particular act, its nature "and character? In the present case the transaction "between the parties, under the ordinance of 1900, "was closed; nothing was left to be done except to "collect the license due which was authorized by "law then in force. Upon the facts of this particular "case can it be said that it was the intention of the "Legislature by its passage of the act of 1901 to an- "nihilate the cause of action provided for in the act "of 1897, and terminate all pending suits of its en- "forcement, or was it simply to take away the power "of the Board of Supervisors in the future to license "for revenue only? * * *

"The defendant in error contends that the license "fee or tax, after the preliminary steps taken for its "collection, became a debt (and it is so expressly de- "clared to be in the ordinance in question); and "that it had a vested right to collect the same. It "has frequently been held that a direct tax duly as- "sessed and levied upon real or personal property, "is not a debt within the broad meaning of that term. "But a license fee or tax does not stand upon the "same plane. It is true that a vested right is usually "based upon contracts, but it may also be based upon "transactions in the nature of a contract.

"In Sutherland on Stat. Const., Sec. 164, the au-

" thor said: 'When a right has arisen on a contract,
" 'or a transaction in the nature of a contract au-
" thorized by a statute, and has been so far perfected
" 'that nothing remains to be done by the party as-
" 'serting such right, the repeal of the statute will not
" 'affect it or an action for its enforcement. It has-
" 'become a vested right which stands independently
" 'of the statute.' "

It is submitted with all respect for the decision of the Circuit Court of Appeals, that it does not harmonize with the decisions of the Supreme Court of California and that while expressly recognizing the existence and effect of these decisions, it arrives at a conclusion contradictory and antagonistic thereto, as may be readily seen by comparison.

Thus the Circuit Court of Appeals say: " This
" principle has been applied more frequently to
" penal statutes and it may be regarded as an estab-
" lished rule that the repeal of a penal statute with-
" out any saving clause has the effect to deprive the
" court in which any prosecution under the statute is
" pending of all power to proceed further."

And the Supreme Court say: "The right given
" the plaintiff in this case, *being penal in its nature,*
" and the remedy created solely by statute, its en-
" forcement is dependent upon the statute alone. It
" is still inchoate, and not reduced to possession nor
" perfected by final judgment. In such case the re-

"peal of the statute destroys the remedy unless the re-
"pealing statute contains a saving clause."

And again the Circuit Court of Appeals say: "The defendant in error contends that the license "fee or tax, after the preliminary steps taken for its "collection, became a debt. * * * It is true "that a vested right is usually based upon contracts, "but it may also be based upon transactions in the na-"ture of a contract."

And the Supreme Court say: "The action is not "to recover upon any contract obligation. If recov-"ery can be had, it is upon the theory that defendant "has violated the law. The violation of the law is "measured in dollars, and the amount of its vio-"lation is authorized to be recovered in a civil ac-"tion. The defendant does not owe for any license, "because he refused to take out a license. The re-"covery is sought for his refusal."

The Circuit Court of Appeals held that "the trans-"action between the parties, under the ordi-"nance of 1900, was closed" and "nothing was left "to be done except to collect the license due which "was authorized by the law then in force," but in *Curtin's* case in just the same manner the transaction between the parties was closed and nothing left to be done except to collect the license due which was authorizd by the law then in force. And the Supreme Court said that the ordinance *"must be re-"garded as if it never existed, except for the purposes*

" of those actions which were commenced, prosecut-
" ed and concluded while it was an existing law" and that the right of plaintiff in that case was *" still in-*
" choate and not reduced to possession nor perfected
" by final judgment."

The Circuit Court of Appeals say: "The plaintiff " in error did not directly promise to pay the license " tax demanded by the defendant in error, but he " herded and grazed his sheep in Sierra County " when the law for the imposition and collection of " the license tax was in full force and effect. He " reaped the full benefit of the law, and then refused " to comply with it." With respect to that Court it may be asked, What benefit did he reap? What benefit did the law confer on him? He was not accorded any protection or privilege thereby, which he did not have before its enactment. He could pay the tax and raise his sheep or he could raise his sheep and pay the tax. No right or privilege to raise sheep is conferred by the ordinance. His position was unaltered by its enactment, except that he was obliged to pay a tax. He has reaped no benefit; the county has accorded him no rights; no question of reciprocal obligations can arise.

But in the *Curtin* and *Guidinger* cases it might equally well be said that the defendants had "reaped " the full benefit of the law." Curtin was engaged in his profession, Guidinger was acting as a laundry agent "when the law for the imposition and collec-

tion of the license was in full force and effect." They reaped no benefit; they acquired no rights; they merely contracted an obligation, and the sovereign power of the state released them therefrom before its payment.

The case of *City of Oakland* vs. *Whipple* (44 Cal., 303), cited by the Circuit Court of Appeals in its opinion, it is respectfully submitted, is not in point. That was an action to recover delinquent taxes, but the right to levy those taxes had not been repealed, The right thereto, it is true, was founded solely on statute, but that statute was still in existence. The action was instituted under the provisions of the law then in force. (Cal. Stats., 1861, p. 419, Secs. 34-48.) While that action was pending a statute was enacted that before a certain date in each year the tax collector should complete and publish the delinquent list and then should proceed to collect the delinquent taxes. The defendant contended that the law under which that action was commenced was repealed and the plaintiff could not maintain its action. And the Court said, as cited by the Circuit Court of Appeals, "To hold that the act was intended to have a retro-"spective operation, so as to affect taxes which had "already become due, would be to hold that the "Legislature intended to remit all those taxes. A re-"sult so manifestly incompatible with the plainest "provisions of the Constitution, would not be in-"ferred, but must be made apparent by clear and un-

"equivocal language. That construction is not nec-
"essary in order to give full effect to the Act, and
"in our opinion it was not intended that the Act
"should have a retrospective operation; but the
"intent was that the taxes then due should be collect-
"ed according to the law then in force." There was no contention that the tax obligation had been remitted by the repeal—only that the law imposed certain conditions in the matter of preparation and publication of the delinquent list, precedent to the maintenance of the action and that by expiration of time within which those conditions could be performed as to the taxes of the prior year, the right to maintain the action was lost. But the Court said the statute is not retroactive; the action is to be prosecuted according to the law as it existed at the time of its institution. That case goes only to the effect of a repeal of a rule of procedure, not to the effect of the repeal of a right or remedy created and existing solely by statute. The language of the Court: "The taxes "then due should be collected according to the law "then in force" relates only to the *manner* of their collection, not to the *right* of collection, for the right had not been repealed and was still in force.

But even if the effect of this decision were such as the Circuit Court of Appeals has held, at least so far as it affects license taxes for revenue, it has been overruled by the cases last cited.

It is submitted that irrespective of the decisions of

the courts of other states and of their rulings on the effect of similar statutes, the decisions of the Supreme Court of California in the construction of a statute of that state must be read into that statute and conclusively control the Federal Courts in their determination of its object and effect.

Brown vs. *New Jersey*, 175 U. S., 172.
Noble vs. *Mitchell*, 164 U. S., 367.
Illinois Cent. R. Co. vs *Illinois*, 163 U. S., 142.
New York L. E. & W. R. Co. vs. *Pennsylvania*, 158 U. S., 431.
Leeper vs. *Texas*, 139 U. S., 462.
Missouri, K. & T. Ry Co. vs. *McCann*, 174 U. S., 580.
Cravens vs. *N. Y. Life Ins. Co.*, 178 U. S., 389.
Morley vs. *Lake Shore & M. S. Ry. Co.*, 146 U. S. 162.
Lapp vs. *Ritter*, 88 Fed., 108.
Southern Ry. Co. vs. *North Carolina Corp. Comm*, 99 Fed., 102.

Mr. Justice Harlan, said when on circuit in *O'Brien* vs. *Wheelock* (95 Fed., 883, 905): "The "federal courts, for the sake of harmony and to "avoid confusion, should 'lean towards an agreement "'of views with the state courts, if the question seems "'to them balanced with doubt,' and endeavor to

" avoid 'any unseemly conflict with the well-consid-
" 'ered decisions of the state courts' upon questions
" of local law. These considerations have peculiar,
" if not controlling weight, when the question to be
" determined relates to the jurisdiction or power,
" under the fundamental law of a state, of tribunals
" or bodies created by legislative enactment, and
" charged with the performance of public duties."

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the cause therein entitled *P. L. Flanigan, Plaintiff in Error,* vs. *The County of Sierra, Defendant in Error,* and numbered 832, to the end that the said cause may be reviewed and determined by this court and that the said judgment of the said Circuit Court of Appeals in the said cause be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

P. L. FLANIGAN,
Petitioner.

By J. C. CAMPBELL,
Attorney and Counsel for Petitioner.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA, } ss.
CITY AND COUNTY OF SAN FRANCISCO.

J. C. CAMPBELL, being first duly sworn, deposes and says: That he is the attorney and of counsel for P. L. Flanigan, the petitioner above named, and as such has had personal charge of the cause in the foregoing petition mentioned in the Circuit Court of the United States for the Northern District of California and in the United States Circuit Court of Appeals for the Ninth Circuit; that he has read the said petition, and that the facts therein stated are true to the best of his information and belief, and that this proceeding is not prosecuted for the purpose of delay.

J. C. CAMPBELL.

Subscribed and sworn to before me this.....day of August, 1903.

[SEAL] GEORGE F. HATTON,
Notary Public, in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing petition and application for a writ of certiorari, and that in my opinion the same is well

founded and the case is one in which the prayer of the petitioner should be granted by this Court.

J. C. CAMPBELL,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

P. L. FLANIGAN,
Petitioner,

vs.

THE COUNTY OF SIERRA,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

The respondent is a county of the State of California and is a body politic and corporate under the laws thereof.

During the month of May, 1900, under and by virtue of that certain act entitled "An Act to establish a "uniform system of county and township govern- "ments" (Cal. Stats., 1897, Ch. CCLXXVII), commonly known as "The County Government Act," the Board of Supervisors of that county had power "To

" license for regulation and revenue, all and every " kind of business not prohibited by law, and trans- " acted and carried on in such county, and all shows, " exhibitions, and lawful games carried on therein, " to fix the rates of license tax upon the same, and " to provide for the collection of the same, by suit " or otherwise." (Sec. 25, subd. 25).

Upon the 31st day of May, 1900, the Board of Supervisors duly enacted an ordinance which is in part as follows:

" Section 1. Each and every person, co-partner- " ship, firm or corporation, engaged in the business " of raising, grazing, herding and pasturing sheep " in the County of Sierra, State of California, must " annually procure a license therefor from the " License Collector, and must pay therefor the sum " of ten (10) cents for each sheep or lamb owned by, " in the possession of, or under the control of such " person, co-partnership, firm or corporation, and " used in such business in said county.

" Section 2. Each and every person, co-partner- " ship, firm or corporation who may engage in the " business of raising, grazing, herding or pasturing " sheep within the County of Sierra, State of Cali- " fornia, in order to procure a license therefor, must " present to the License Collector of said county, at " the time of making application therefor, the affi- " davit of such owner, his foreman, agent or person " in charge of such sheep owned by and in the pos- " session of and under the control of such applicant

" for license within said county, and upon presenting " such affidavit and the payment of the license tax, " as prescribed in Section 1 of this ordinance, the " applicant shall be granted a license to raise, graze, " herd or pasture sheep within the said County of " Sierra. * * *

" Section 4. All licenses to be collected under " this ordinance are payable annually, and shall be- " come due and payable in advance at the office of " the License Collector, and if any license is not paid " within fifteen days after the commencement of said " business an additional tax of ten per cent is hereby " added, to be collected with the original " amount. * * *

" Section 7. The amount of the license tax fixed " by this ordinance for the transaction or carrying " on any business named herein shall be deemed a " debt due to the County of Sierra, and if any per- " son fails, neglects or refuses to take out and procure " a license issued under the provisions and in the " manner provided in this ordinance, the said License " Collector shall direct the District Attorney of said " county to bring suit in the name of the County of " Sierra for the recovery of such license * * * " and in case of recovery by the plaintiff fifty dollars " damages and costs must be added to the judgment " to be collected from the defendant.

" Section 8. The License Collector shall issue " licenses for the year in which said license is pro- " cured and out of each license collected by him he

" may retain for his fee therefor the sum of 10 per " cent thereof which said fee shall belong to " him. * * *

" Section 10. All money collected for licenses " under the provisions of this ordinance, less said fee " of 10 per cent, shall be paid over to the County " Treasurer, as other moneys are and be placed to " the credit of the general funds of the county."

The petitioner is a citizen of the State of Nevada, and during the months of May and June of the year 1900 was engaged in the business of raising, grazing, herding and pasturing sheep in the county of Sierra, and had in his possession and under his control some 25,000 sheep. He did not procure a license and did not pay the tax, as required by that ordinance.

An action under and by the authority of that ordinance, to recover the sum of $2,500 the amount of such unpaid tax and for the additional sum of $50 by way of damages was commenced upon the 25th day of June, 1900, in the Superior Court of the State of California, in and for the County of Sierra, by the respondent against the petitioner. That cause was afterwards duly removed to the United States Circuit Court, Ninth Circuit, Northern District of California.

On the 16th day of August, 1900, the defendant demurred to the complaint, which alleged substantially the facts hereinbefore set out, upon the ground that it did not state facts sufficient to constitute a cause of action against him.

By an act of the Legislature of the State of California, approved on the 23d day of March, 1901, (Cal.

Stats., 1900, Chap. CCIX, p. 635) there was added to the Political Code of the State of California a new section numbered 3366, which provided as follows:

"Boards of Supervisors of the counties of the "State, and the legislative bodies of the incorpo- "rated cities and towns therein, shall, in the exer- "cise of their police powers, and *for the purpose of* "*regulation,* as herein provided, *and not otherwise,* "have power to license all and every kind of busi- "ness not prohibited by law, and transacted and "carried on within the limits of their respective "jurisdictions, and all shows, exhibitions and law- "ful games carried on therein, to fix the rates of "license tax upon the same, and to provide for the "collection of the same by suit or otherwise."

Thereafter upon the demurrer it was contended that by reason of the repeal effected by the act of 1901, of the power to license for revenue conferred upon Boards of Supervisors by the County Government Act, the respondent could not maintain its action. But upon the 25th day of November, 1901, the Circuit Court overruled the demurrer with leave to defendant to answer within twenty days. The defendant did not so answer and judgment by default was entered against him as prayed for in the complaint.

Thereafter the defendant prosecuted a writ of error to the Circuit Court of Appeals, Ninth Circuit, to review such judgment, and upon the hearing thereof the judgment was affirmed.

The record and proceedings in that cause in the

Circuit Court of Appeals now come before this Court for review upon writ of certiorari.

ASSIGNMENT OF ERRORS.

I.

The complaint does not state facts sufficient to constitute a cause of action.

II.

The Circuit Court erred in making and entering its order whereby the demurrer to the complaint was overruled.

III.

The Circuit Court erred in giving, making and entering its judgment in favor of plaintiff and against defendant.

BRIEF OF ARGUMENT.

I.

The ordinance under which this action was commenced was repealed by the act of the Legislature of the State of California of March 23, 1901, and hence the action is abated.

II.

The ordinance is in conflict with the constitution of the State of California for (1) it imposes a double taxation; (2) it is not uniform in its operation and (3) it levies a tax without a prior assessment.

I.

The Ordinance under which this Action was Commenced was Repealed by the Act of the Legislature of the State of California of March 23, 1901, and Hence the Action is Abated.

The ordinance upon which this action is based is obviously enacted for the sole purpose of raising revenue, for in no respect does it purport to regulate the business of sheep raising. The mere word "license" has no talismanic power to change the nature of the ordinance; to make that regulatory which is fiscal;

to invoke the police power to sustain the enactment if the taxing power shall fail. Whether this ordinance be regulatory or fiscal, must be determined by an examination of the purposes and objects thereof, and not by its purported object.

Does the ordinance license the business of sheep raising? Most obviously it does not. What is a license? It is a special privilege to do an act or carry on a business, the performance of transaction of which without such permission is forbidden. The Supreme Court of California has said in *Sonora* vs. *Curtin* (137 Cal. 583): "A license in its proper sense is a permit to do business which could not be done without the license." Judge Cooley in his work on Taxation (p. 573) says: "A license is a right granted by some competent authority to do an act which, without such authority, would be illegal." In *Mayor* vs. *Charlton* (36 Ga. 460, 462) it is said: "A license confers a privilege, and makes the doing of something legal, which, if done without it, would be illegal."

And see:

Insurance Co. vs. *Augusta*, 50 Ga. 530.

Burch vs. *Savannah*, 42 Ga. 596.

Chilvers vs. *People*, 11 Mich. 43.

Robinson vs. *Mayor*, 1 Humph. 156.

Ould vs. *Richmond*, 23 Gratt. 464.

Reed vs. *Beall*, 42 Miss. 472.

The so-called "license" of the ordinance when so

tested is no license. It is but a tax receipt, and the so-called "license tax" merely a revenue tax. For the ordinance does not forbid or make illegal the carrying on of the business mentioned unless a license be procured; it does not require that a license be procured as a prerequisite to lawfully engaging in the business. Its only provision is that sheepmen "engaged in the business" shall pay an annual tax and procure a "license" and if they fail to do so, the amount of the tax, with certain added penalties, shall be a debt due the county. This tax is to be collected by a civil suit, and when recovered the defendant has a perfect right to continue in the business whether or not he procures the "license" mentioned in Section one. The permission which is the very essential and synonym of license, is not a prerequisite to engaging in the business; the only demand of the county is that the tax shall be paid. The effect of the ordinance is not otherwise than if it had provided that all sheep owned by those engaged in this business, should be taxed ten cents a head; that upon the payment of the tax the owner should be entitled to a tax receipt evidencing such payment, and that if it were not paid, it should become a debt due the county to be collected by a civil suit. Calling the tax receipt a "license" and the tax a "license tax" does not confine the lawful authority to transact this business to those who have paid the tax and procured the "license" any more than an ordinary tax on property creates a right or authority to own property. A license is a

police regulation controlling the exercise of a profession, business or occupation.

As was said by the Supreme Court of Utah in *Cache County* vs. *Jensen* (61 Pac. 303): "License, in com-
" mon parlance, implies permission to do something
" which may not be done without a license. * * *
" A mere tax imposed upon a business or occupation
" therefore, is not a license or privilege as to the busi-
" ness which would not otherwise exist. * * *
" Evidently the efforts of the Board resulted not in
" the imposition of a license upon a business, but in
" the levy of an unequal and unjust tax upon prop-
" erty. The thing provided for by this instrument is
" not a license * * * but by design a prohibitive
" tax."

In *Mayor* vs. *Second Avenue R. R.* (32 N. Y., 261), the Court say: "Regulations of police are regulations
" of internal or domestic government forbidding some
" things and enjoining the performance of others for
" the security and protection and to promote the hap-
" piness of the governed. The only act enjoined by
" the ordinance in question is the payment of the fifty
" dollars, and the only act which it forbids and pro-
" hibits is the running of the cars without the pay-
" ment of the money. If the Legislature should by
" law require every head of a family throughout the
" State to pay to the collector the sum of twenty dol-
" lars, and take his receipt therefor, it would be a
" fiscal measure, an expedient to replenish the treas-
" ury, not a regulation of police prescribing a rule of
" action and conduct. So with this ordinance, call

"what it requires by the name of license, or certifi-
"cate of payment, or anything else, its primary and
"indeed only purpose is to take from the company
"under coercion of the penalty which it imposes, the
"sum of fifty dollars annually for each car run upon
"the road, for the benefit of the city. The certificate
"which the company is to receive upon payment being
"made is called a license in the ordinance. * * *
"It is vain, therefore, to speak of it or treat it as a
"license, or a regulation of police. It is the imposi-
"tion of an annual tax upon the company."

The ordinance by its very terms is a fiscal, not a regulatory, measure. The moneys derived from the license tax are not used for the purpose of regulating or policing the business licensed, but, less the ten per cent deducted as the collector's fee, "*shall "be paid over to the County Treasury, as other "moneys are, and be placed to the credit of the gen-"eral fund of the county.*"

In *Mays* vs. *Cincinnati* (1 Ohio St. 268), the Court say: "A license may include a tax, or it may not. If "the exaction goes no further than to cover the neces-"sary expenses of issuing it, it does not, *but it is "made a means of supplying money for the public "treasury * * * that it is a tax is too palpable for "discussion.*"

In *American Fertilizing Co.* vs. *Board of Agriculture* (43 Fed. 609), the Circuit Court for the Eastern District of North Carolina say: "Defendants contend "that this taxation can be sustained as a part of the

"police power of the State. * * If the legislation "in question can properly be referred to that power, "it will be because the right to pass inspection laws "may be deemed to have its foundation in the police "power of a State. Certainly if it be anything but "what the act itself seems to contemplate—a tax on "an occupation, or a privilege tax—it is because it is "used to secure an inspection of commercial fertiliz- "ers before they can be sold in North Carolina. Such "a tax would be constitutional only within the limits "of the Constitution. It cannot be sustained where "evidently in excess of what is required for such pur- "pose, *and when the proceeds are applied to other "uses.*"

See, also,

Flanigan vs. *Plainfield*, 44 N. J. L., 118.

Cooley on Taxation, 597.

That the purpose of this ordinance is to provide revenue for the county in the same manner as the ordinary tax levy, to be paid into the county treasury "as other moneys are," and to be expended for the general purposes of the county, is too palpable to admit of discussion; and on the other hand in no manner does it regulate, even incidentally, the business which it purports to license.

The Supreme Court of Utah, in *Cache County* vs. *Jensen* (61 Pac. 303), construing an almost identical ordinance, say: "The ordinance does not even contain "a hint as to regulation of the business, nor that the "business requires any regulation, nor that the

"county will afford protection of any kind to the per-
"son engaged in the business, nor that it is of such a
"character as to require regulation or protection.
"The business may be conducted by those engaged
"therein where and how they will. No intention to
"regulate it is manifest from the context or otherwise.
"This ordinance imposes no restrictions as to the
"manner the business shall be carried on, and grants
"no lawful privilege that was not previously en-
"joyed."

The Supreme Court of California has said, in *Merced County* vs. *Helm* (102 Cal. 159, 163), in reference to an ordinance of similar character: "By its very "terms the ordinance is a revenue measure, and this "suit is simply a civil action to recover a liability al-"leged to have been incurred by the defendants by "virtue of the provisions of the ordinance, and the "collection of a tax does not come within the exercise "of police power as a prohibitory measure. That "power is exercised in the enforcement of a penalty "prescribed for a non-compliance with the law, or for "the doing of some prohibited act. As the county has "chosen by this ordinance to require a license tax for "engaging in certain kinds of business, and that this "tax shall be collected by a suit, and has fixed no pen-"alty for engaging in the business, the ordinance is "not to be regarded as the exercise of its police power, "but rather as its desire to regulate the business and "derive a revenue therefrom."

In Colorado, in *Kiowa County* vs. *Dunn* (40. Pac. 357) the Court say: "While a license tax may be

"levied upon such business or occupation as are "proper subjects of municipal regulation and control, "and the purpose of such tax is for regulation or re- "straint, yet, when all the elements of regulation or "restraint are wanting, and the primary purpose of "the act is the raising of revenue only, then it loses "its character as a license tax, and becomes a tax for "revenue. 'Only those cases where regulation is the "'primary purpose can be specially referred to the "'police power.' (Cooley on Taxation, 397.) For "this reason the act under consideration cannot be up- "held as a legitimate exercise of police power."

By the act of March 23, 1901 (Cal. Stats., 1900, Chap. CCIX, p. 635), there was added to the Political Code of California, a new section numbered 3366, which provides as follows:

"Boards of Supervisors of the counties of the State, "and the legislative bodies of the incorporated cities "and towns therein, shall, in the exercise of their "police powers, and *for the purpose of regulation*, as "herein provided, *and not otherwise*, have power to "license all and every kind of business not prohibited "by law, and transacted and carried on within the "limits of their respective jurisdictions, and all "shows, exhibitions and lawful games carried on "therein, to fix the rates of license tax upon the same, "and to provide for the collection of the same by suit "or otherwise."

In *Ex parte Pfirrmann* (134 Cal. 143), the Supreme Court of California say in part: "Prior to the act of

"1901, Boards of Supervisors, by virtue of sub-
"division 25 of Section 25 of the County Government
"Act, possessed the power to collect a license tax for
"revenue in all parts of the county. But the act of
"1901 must be held to repeal by implication, the power
"thus granted. The later act provides: 'Boards of
"'Supervisors * * * shall in the exercise of their
"'police powers, and for the purpose of regulation,
"'as herein provided, and not otherwise, have power
"'to license all and every kind of business,' etc. This
"language is too plain to be construed. It speaks for
"itself, and declares that Boards of Supervisors may
"issue licenses for the purpose of regulation alone.
"The words 'not otherwise' curtail and cut off all
"power Boards of Supervisors theretofore had to is-
"sue licenses and charge therefor as a revenue meas-
"ure."

This ordinance was enacted solely as a revenue measure. Under the law, as it stands to-day, the Board of Supervisors of the county appellant is divested of authority to enact the ordinance and it stands repealed.

In the case of *Sonora* vs. *Curtin* (137 Cal. 583) the Trustees of the City of Sonora had passed an ordinance on June 4, 1900, providing that any person engaged in any pursuit therein named, should obtain a license therefor; that attorneys-at-law should pay three dollars per quarter, and that "the license imposed thereunder" should be deemed a debt due the city payable in advance, and if such license should not

be paid it might be recovered in a civil action, with an additional penalty of ten dollars.

The same Court in part say: "Defendant was at "the time of the passage of the ordinance, an attor- "ney-at-law, admitted and licensed to practice in all "the Courts of the State, and he was then engaged, "and continued thereafter to be engaged in the prac- "tice of law in the City of Sonora within the territory "covered by said ordinance. He neglected and re- "fused to procure a license under said ordinance, or "to pay the license tax imposed by its terms.

"Plaintiff is a municipal corporation of the sixth "class incorporated under an Act of the Legislature "entitled, 'An Act to provide for the organization, in- "'corporation, and government of municipal corpora- "'tions,' approved March 13, 1883 (Stats., 1883, p. "93). The authority for passing the ordinance is "claimed under subdivision 10 of Section 852 of the "Act, which was in force at the time of its passage, "and which provides that Boards of Trustees of "Municipal Corporations of the sixth class shall have "power 'to license for purposes of regulation and "'revenue, and every kind of business authorized by "'law and transacted or carried on in such city or "'town * * * to fix the rates of license tax upon the "'same, and to provide for the collection of the same "'by suit or otherwise.' If it be conceded that the "practice of law is a 'business authorized by law and "'transacted or carried on in such city or town,'" "within the meaning of the statute, and that the pro- "vision, 'Every attorney-at-law shall pay a license of

"'three dollars a quarter,' is a provision for a license "tax upon the business of practicing law, and not "upon the person because he is an attorney-at-law, is "it a license tax imposed for the purpose of revenue, "or is it a regulation under the police powers of the "town? It is well settled that a business or occupa- "tion may be taxed, under authority to tax for the "purposes of revenue, and in such cases the tax is "properly a license tax. A license in its proper sense "is a permit to do business which could not be done "without the license. It is evident that the license "tax imposed by the ordinance in question is not a "license in the sense of a permit to defendant to prac- "tice law, because he already has a license, and has "paid the fee therefor, which permits him to practice "law. Although a business, occupation or profession "may be thus licensed, by having a license issued "which permits the business to be carried on, still it "may under a proper statute, be subject to an addi- "tional license tax. Now the defendant here having "obtained his license, which permits him to practice "law, the ordinance in question could not take away "that license or permit because of the refusal to pay "the license tax. The ordinance, therefore, plainly by "its terms imposed the charge as a license tax. It is "called in the ordinance a license tax, and it is therein "said the license tax shall be deemed a sum due the "city. The tax was not imposed as a police regula- "tion. A police regulation or restraint is for the pur- "pose of preventing damage to the public or to third "persons. * * *

"The Board of Trustees of a city * * * cannot "in any way or manner regulate the business or pro- "fession of practicing law. If it possessed any power "to pass the ordinance in question it was under the "power to license for the purpose of revenue. Since "the ordinance was passed, the Legislature, by "an Act approved March 23, 1901 (Statutes and "Amendments to the Codes, 1901, p. 635), added Sec- "tion 3366 to the Political Code, which so far as "material here, is as follows: 'Boards of Supervisors "'of the counties of this State, and the legislative "'bodies of the incorporated cities and towns therein, "'shall, in the exercise of their police powers, and for "'the purposes of regulation, as herein provided, and "'not otherwise, have power to license all and every "'kind of business not prohibited by law, and trans- "'acted and carried on within the limits of their re- "'spective jurisdictions * * * to fix the rates of "'license tax upon the same, and to provide for the "'collection of the same by suit or otherwise.' * * *

"The section of the Act of 1883 herein quoted giv- "ing to the Board of Trustees power to license for "purposes of revenue is repealed by implication by "said Section 3366 of the Political Code. It declares "and limits the power of the Board to license for the "purpose of regulation in the exercise of their police "powers. The words 'not otherwise' are used to "emphasize the meaning of the section. * * *

"The action is not to recover upon any contract "obligation. If recovery can be had, it is upon the "theory that defendant has violated the law. The

" violation of the law is measured in dollars, and the " amount for its violation is authorized to be recov- " ered in a civil action. The defendant does not owe " for any license, because he refused to take out a " license. The recovery is sought for his refusal. The " authority under which the ordinance for revenue " purposes was passed being repealed, the ordinance " is repealed as to all such purposes, and must be re- " garded as if it never existed, except for the purpose " of those actions which were commenced, prosecuted " and concluded while it was an existing law.

" The ordinance here in question provided that the " three dollars 'together with the sum of ten dollars " 'thereto added after the expiration of said ten days, " 'shall become in each and every instance of delin- " 'quency, as aforesaid, the license tax as imposed by " 'this ordinance.'

" The right is given by the ordinance to bring a " civil suit to recover the amount so made a license " tax. The civil remedy was created by the ordinance, " and the remedy is repealed by the repeal of the ordi- " nance as to revenue. * * * "

And again in *Santa Monica* vs. *Guidinger* (137 Cal. 658) the same Court say: " From the title of the " ordinance, the absence of regulatory provisions, the " amounts of the several taxes imposed, and the nature " of the particular subject of taxation involved here, it " is clear that the license tax in question was imposed " for the purpose of raising revenue. The case is " therefore substantially similar to that of the *City of* " *Sonora* vs. *Curtin* (*ante* p. 583), just decided, and it

" must therefore be held on the authority of the de-
" cision in that case that the license tax in question
" was repealed, and the right of action therefor ex-
" tinguished by Section 3366 of the Political Code."

But the Circuit Court of Appeals decided in diametric opposition to the Supreme Court of California, as to the effect of the enactment of the repealing act, upon the pending action. They say in part:

" *The Supreme Court of California has held that*
" *Section 3366 repeals, by implication, the prior act of*
" *1897, in so far as the same relates to the power to*
" *collect a license tax for revenue, thus restricting the*
" *licensing power of Boards of Supervisors, under the*
" *Act of 1897, to matters of regulation alone.* (*Ex*
" *parte Pfirrmann*, 134 Cal., 143, 147-8; *City of Sonora*
" vs. *Curtin*, 70 Pac., 674; *Town of Santa Monica* vs.
" *Guidinger*, 70 Pac., 732.)

" What effect does this repealing act have upon the
" present action which was brought under the provi-
" sions of the law of 1897, before it was repealed?

" Counsel for plaintiff in error contend, that inas-
" much the law under which the ordinance for revenue
" purposes was passed, has been repealed, the ordi-
" nance is repealed as to all such purposes, and must
" be regarded as if it never existed except for the pur-
" poses of those actions which were commenced, prose-
" cuted and concluded while it was existing law, and
" rely upon *the rule announced in many authorities,*
" *that where the right and remedy is given by statute*
" *to bring a civil action for the collection of a license*
" *tax, the repeal of the statute destroys the remedy*

" *unless the repealing statute contains a saving*
" *clause.* * * *

" This principle has been applied more frequently
" to penal statutes and it may be regarded as an es-
" tablished rule that the repeal of a penal statute
" without any saving clause has the effect to deprive
" the Court in which any prosecution under the
" statute is pending of all power to proceed further
" in the matter, and in such cases the proceeding
" will be arrested at the very point where it is at the
" time of the repeal, because: 'The repeal of the
" 'law imposing the penalty is of itself a remis-
" 'sion.'

" The ordinance under discussion was adopted
" May 31, 1900; it went into effect fifteen days there-
" after. This action was commenced June 25, 1900.
" The amendment to the Code, Section 3366, was
" approved March 23, 1901. The judgment in this
" case was entered March 7, 1902. Under these cir-
" cumstances does it necessarily follow that because
" a saving clause was not inserted, the act of 1901
" should be given a 'retrospective operation?' Does
" this question not depend upon the circumstances
" and conditions of each particular act, its nature
" and character? In the present case the transaction
" between the parties, under the ordinance of 1900,
" was closed; nothing was left to be done except to
" collect the license due which was authorized by law
" then in force. Upon the facts of this particular case
" can it be said that it was the intention of the Legis-
" lature by its passage of the act of 1901 to annihilate

"the cause of action provided for in the act of 1897,
"and terminate all pending suits for its enforcement,
"or was it simply to take away the power of the Board
"of Supervisors in the future to license for revenue
"only? * * *

"The defendant in error contends that the license
"fee or tax, after the preliminary steps taken for its
"collection, became a debt (and it is so expressly de-
"clared to be in the ordinance in question); and that
"it had a vested right to collect the same. It has
"frequently been held that a direct tax duly assessed
"and levied upon real or personal property, is not
"a debt within the broad meaning of that term. But
"a license fee or tax does not stand upon the same
"plane. It is true that a vested right is usually based
"upon contracts, but it may also be based upon trans-
"actions in the nature of a contract.

"In Sutherland on Stat. Const., Sec. 164, the au-
"thor said: 'When a right has arisen on a contract,
"'or a transaction in the nature of a contract au-
"'thorized by a statute, and has been so far perfected
"'that nothing remains to be done by the party as-
"'serting such right, the repeal of the statute will not
"'affect it or an action for its enforcement. It has
"'become a vested right which stands independently
"'of the statute.'"

It is submitted with all respect for the decision of the Circuit Court of Appeals, that it does not harmonize with the decisions of the Supreme Court of California and that while expressly recognizing the existence and effect of these decisions, it arrives at

a conclusion contradictory and antagonistic thereto, as may be readily seen by comparison.

Thus the Circuit Court of Appeals say: "This "principle has been applied more frequently to "penal statutes and it may be regarded as an estab- "lished rule that the repeal of a penal statute with- "out any saving clause has the effect to deprive the "court in which any prosecution under the statute is "pending of all power to proceed further."

And the Supreme Court say: "The right given "the plaintiff in this case, *being penal in its nature*, "and the remedy created solely by statute, its en- "forcement is dependent upon the statute alone. It "is still inchoate, and not reduced to possession nor "perfected by final judgment. In such case the re- "peal of the statute destroys the remedy unless the re- "pealing statute contains a saving clause."

And again the Circuit Court of Appeals say: "The defendant in error contends that the license "fee or tax, after the preliminary steps taken for its "collection, became a debt. * * * It is true "that a vested right is usually based upon contracts, "but it may also be based upon transactions in the na- "ture of a contract."

And the Supreme Court say: "The action is not "to recover upon any contract obligation. If recov- "ery can be had, it is upon the theory that defendant "has violated the law. The violation of the law is "measured in dollars, and the amount of its vio- "lation is authorized to be recovered in a civil ac- "tion. The defendant does not owe for any license,

"because he refused to take out a license. The re-
"covery is sought for his refusal."

The Circuit Court of Appeals held that "the trans-
"action between the parties, under the ordi-
"nance of 1900, was closed" and "nothing was left
"to be done except to collect the license due which
"was authorized by the law then in force," but in *Curtin's* case in just the same manner the transaction between the parties was closed and nothing left to be done except to collect the license due which was authorized by the law then in force. And the Supreme Court said that the ordinance *"must be re-
"garded as if it never existed, except for the purposes
"of those actions which were commenced, prosecut-
"ed and concluded while it was an existing law"* and that the right of plaintiff in that case was *"still in-
"choate and not reduced to possession nor perfected
"by final judgment."*

The Circuit Court of Appeals say: "The plaintiff
"in error did not directly promise to pay the license
"tax demanded by the defendant in error, but he
"herded and grazed his sheep in Sierra County
"when the law for the imposition and collection of
"the license tax was in full force and effect. He
"reaped the full benefit of the law, and then refused
"to comply with it." With respect to that Court it may be asked, What benefit did he reap? What benefit did the law confer on him? He was not accorded any protection or privilege thereby, which he did not have before its enactment. He could pay the tax and raise his sheep or he could raise his sheep

and pay the tax. No right or privilege to raise sheep is conferred by the ordinance. His privilege was unaltered by its enactment, except that he was obliged to pay a tax. He has reaped no benefit; the county has accorded him no rights; no question of reciprocal obligations can arise.

But in the *Curtin* and *Guidinger* cases it might equally well be said that the defendants had "reaped "the full benefit of the law." Curtin was engaged in his profession, Guidinger was acting as a laundry agent "when the law for the imposition and collec- "tion of the license was in full force and effect." They reaped no benefit; they acquired no rights; they merely contracted an obligation, and the sovereign power of the state released them therefrom before its payment.

The case of *City of Oakland* vs. *Whipple* (44 Cal., 303), cited by the Circuit Court of Appeals in its opinion, it is respectfully submitted, is not in point. That was an action to recover delinquent taxes, but the right to levy those taxes had not been repealed, The right thereto, it is true, was founded solely on statute, but that statute was still in existence. The action was instituted under the provisions of the law then in force. (Cal. Stats., 1861, p. 419, Secs. 34-48.) While that action was pending a statute was enacted that before a certain date in each year the tax collector should complete and publish the delinquent list and then should proceed to collect the delinquent taxes. The defendant contended that the law under which that action was commenced was repealed and

the plaintiff could not maintain its action. And the Court said, as cited by the Circuit Court of Appeals, "To hold that the act was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the Legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the Constitution, would not be inferred, but must be made apparent by clear and unequivocal language. That construction is not necessary in order to give full effect to the Act, and in our opinion it was not intended that the Act should have a retrospective operation; but the intent was that the taxes then due should be collected according to the law then in force." There was no contention that the tax obligation had been remitted by the repeal—only that the law imposed certain conditions in the matter of preparation and publication of the delinquent list, precedent to the maintenance of the action and that by expiration of time within which those conditions could be performed as to the taxes of the prior year, the right to maintain the action was lost. But the Court said the statute is not retroactive; the action is to be prosecuted according to the law as it existed at the time of its institution. That case goes only to the effect of a repeal of a rule of procedure, not to the effect of the repeal of a right or remedy created and existing solely by statute. The language of the Court: "The taxes "then due should be collected according to the law "then in force" relates only to the *manner* of their

collection, not to the *right* of collection, for the right had not been repealed and was still in force.

But even if the effect of this decision were such as the Circuit Court of Appeals has held, at least so far as it affects license taxes for revenue, it has been overruled by the cases last cited.

It is submitted that irrespective of the decisions of the courts of other states and of their rulings on the effect of similar statutes, the decisions of the Supreme Court of California in the construction of a statute of that state must be read into that statute and conclusively control the Federal Courts in their determination of its object and effect.

Brown vs. *New Jersey*, 175 U. S., 172.

Noble vs. *Mitchell*, 164 U. S., 367.

Illinois Cent. R. Co. vs. *Illinois*, 163 U. S., 142.

New York L. E. & W. R. Co. vs. Pennsylvania, 158 U. S., 431.

Leeper vs. *Texas*, 139 U. S., 462.

Missouri, K. & T. Ry. Co. vs. *McCann*, 174 U. S., 580.

Cravens vs. *N. Y. Life Ins. Co.*, 178 U. S., 389.

Morley vs. *Lake Shore & M. S. Ry. Co.*, 146 U. S., 162.

Lapp vs. *Ritter*, 88 Fed., 108.

Southern Ry. Co. vs. North Carolina Corp. Comm., 99 Fed., 102.

Mr. Justice Harlan, said when on circuit in *O'Brien* vs. *Wheelock* (95 Fed., 883, 905): "The

"federal courts, for the sake of harmony and to avoid "confusion, should 'lean towards an agreement of "'views with the state courts, if the question seems "'to them balanced with doubt,' and endeavor to "avoid 'any unseemly conflict with the well-consid- "'ered decisions of the state courts' upon questions "of local law. These considerations have peculiar, "if not controlling weight, when the question to be "determined relates to the jurisdiction or power, "under the fundamental law of a state, of tribunals "or bodies created by legislative enactment, and "charged with the performance of public duties."

II.

The Ordinance is in Conflict with the Constitution of the State of California for (1) it Imposes a Double Taxation; (2) it is not Uniform in its Operation and (3) it Levies a Tax without a Prior Assessment.

In the argument of our last point we have shown that the only effect of the ordinance is to tax—that it is a fiscal measure. We will now consider what is taxed—the business of sheep-raising, or the sheep themselves.

"The substance, and not the form of the tax is to be regarded in ascertaining whether the tax is upon the property or upon a privilege connected therewith." (Burroughs on Taxation, 69.) We believe that a mere casual examination of the ordinance will make it ap-

parent that the tax is on the animals, not on the business. "Every person * * * engaged in the busi- "ness," the ordinance reads, "must annually procure "a license therefor from the license collector, and "must pay therefor the sum of ten cents for each "sheep or lamb." That is to say, every person may procure this license, which does not license—this tax receipt—by paying to the license collector a tax, not on his business, nor on the privilege of conducting it, but on the sheep.

This proposition has been directly decided in Louisiana in *Police Jury* vs. *Nougues* (11 La. Ann. 739). In that case it is said: "The ordinance in question * * * "and the provisions material to the present case are "these:

"'Resolved, that the rate of taxes for licenses on "'professions and occupations for the year 1856 be as "'follows:

"'On each and every person keeping a dairy within "'the limits comprised between the upper line of this "'parish and Verret avenue a yearly tax of two dol- "'lars for each and every cow, payable semi-annually "'and in advance, $2.00 per cow.' * * *

"Dairyman may * * * under the Act of March "15, 1855, be taxed by the police jury of the right bank "of the parish of Orleans. But the tax must be levied "on all dairymen. Now, the ordinance under examina- "tion, while professing to tax the occupation, really "imposes a tax upon cows kept by dairymen within "certain limits on the right bank of the river in the

" parish of Orleans. The tax is two dollars per " cow. * * * Considering it in that light it is equally " inconsistent with a just interpretation of the statute " which conferred the power of taxation upon the " plaintiffs. It is not a tax upon personal property " to be preceded by an assessment, nor even on all " cows kept by certain individuals, whilst other in- " dividuals may keep cows without taxation. This is " not only repugnant to the fundamental principles of " equality which govern the exercise of the taxing " power by the State, but was evidently not within the " scope of the authority attempted to be conferred by " the legislature upon the police jury of the right " bank."

And see

State vs. *Endom*, 23 La. Ann., 663.

Brookfield vs. *Tooey*, 43 S. W. 387.

(1). The Constitution of California (Art. XIII, Sec. 1) provides that "all property in the State * * * shall " be taxed in proportion to its value," that is, the burden of taxation shall fall upon each article of property in the proportion of its value to the value of the entire property of the county. It follows, if after a general tax has been levied, a special additional tax be placed upon certain property, that it is taxed in excess of its proportion and is unduly burdened.

As was said in *Burke* vs. *Badlam* (57 Cal. 594, 600): " The Constitution of the State does not require or " authorize double taxation. On the contrary, its " language clearly forbids it. Thus: " 'All property

"'in the State, not exempt under the laws of the "'United States, shall be taxed in proportion to its "'value, to be ascertained as provided by law' (Sec. 1, " Art. XIII). To tax a portion of the property more " than once would certainly not be taxing all of it in " proportion to its value."

The right of the county to levy and collect taxes arises under Article XI, Section 12, of the Constitution of California: "The legislature * * * may by general " laws vest in the corporate authorities thereof the " power to assess and collect taxes for such (county) " purposes."

The County Government Act (Cal. St. 1883, p. 299, Sec. 4) renders this constitutional provision effective: " It has power * * * to levy and collect such taxes, " for purposes under its exclusive jurisdiction, as are " authorized by law."

The county has only such power of taxation as is conferred by the legislature. It is axiomatic that the legislature can confer no power on the county to levy a tax which itself could not have levied. The sheep within the county have already been assessed and taxed for the purposes of raising a county revenue. This ordinance imposes an additional tax for an identical purpose, and is clearly within the constitutional provision. As was said in *Cache County* vs. *Jensen*, "The " efforts of the Board resulted, not in the imposition of " a license upon a business, but in the levy of an un- " equal and unjust tax upon property."

What constitutes a double taxation is well defined

by Judge Cooley in his work on Taxation (p. 225): "There is a sense, however, in which duplicate taxation may be understood, and which we think is the proper sense, which would render it wholly inadmissible under any constitution requiring equality and uniformity in taxation. By duplicate taxation in this sense is understood the requirement that one person or any one subject of taxation shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute once."

Truly the magic of a word will not avail to change the nature of this tax, nor will a verbal subterfuge enable a county to impose an unconstitutional tax.

(2). A county ordinance is a law of the State (*In re Lawrence*, 69 Cal. 608, 611; *Ex parte Christensen*, 85 Cal. 208, 211; *Murray* vs. *Charleston*, 96 U. S. 432, 440). The taxing power of the county is the delegated power of the State (*United States* vs. *New Orleans*, 98 U. S. 381, 392; *Meriwether* vs. *Garrett*, 102 U. S. 472). Therefore the mandate of the Constitution of California (Art. I, Sec. 11) that all laws of a general nature shall have a uniform operation applies to county ordinances. Unless such an ordinance have a uniform operation it is invalid. (*Ex parte Bohen*, 115 Cal. 372.)

But the ordinance at bar has not a uniform operation. In the first place only the sheep used in the business named therein, not all the sheep in the county, are taxed. Such legislation imposes a tax

upon the sheep of one man and not upon those of another. The butcher's sheep are not taxed, nor are those owned by the farmer and kept for his own consumption.

In the second place, the tax is specific, not *ad valorem*. The same tax is placed upon sheep of one breed as upon those of another. The same tax is placed on lambs as on sheep. The same tax is levied one year with another, irrespective of the fluctuations of the market. Such taxation is not uniform, nor does it conform to the constitutional requirement that all property shall be taxed in proportion to its value.

In the third place the ordinance is class legislation. While we grant that a law is uniform and general that applies solely to a general class, so long as it includes the whole of that class, yet we submit that the selection of that class cannot be arbitrary. The propriety of the limitation is to be judged by the object sought to be attained, by the law.

We have already seen that this ordinance has been enacted under the taxing, not the police power—that its object is to raise revenue, not to regulate a business. While a class defined under the latter power may be reasonable, yet its selection under the former may be highly arbitrary. For instance, if a county ordinance should require as a condition precedent to the right of keeping dogs within the limits of towns, that their owners should take out a license and pay a tax thereon, that would be a valid exercise of the police power, and while the ordinance would affect only certain owners of dogs, yet, its object being to regulate

the keeping of dogs, under conditions which especially demand such regulation, the definition of the class would be reasonable. But if the ordinance should impose a tax on all dogs within town limits and should exempt those without, its object being to raise revenue, the definition of the class would be highly arbitrary and void.

So we claim that the definition of sheep-raisers as a separate class to bear the burden of taxation is highly arbitrary. Had the object of the ordinance been to regulate the raising and pasturing of sheep, this definition of a class might be reasonable. But the selection, for the purpose of taxation, of sheep-raisers out of all the raisers of livestock and of all owners of sheep only those engaged in the business of raising, grazing, herding and pasturing them, is arbitrary. The class is too limited and is not inclusive of all who should pay such a tax. The ordinance imposes an unequal, unfair and undue burden upon the sheep-raiser, and is therefore void.

A law which does not include all the individuals constituting a class has not a uniform operation. When a class has not been defined in the exercise of a sound reason therefor, a law, though including every individual of that class, has not a uniform operation.

"A law may be general in its terms and apply to a "class constituted by having characteristics which "make it a class and yet be an illusory classification "which will not warrant legislation confined to it, "where special or local legislation is prohibited. *The "grouping must be founded on peculiarities requiring*

"*legislation, and legislation which by reason of the* "*absence of such peculiarities is not necessary or* "*applicable outside of that class.* In other words, the "true principle requires something more than a mere "designation by such characteristics as will serve to "classify, for the characteristics which will thus serve "as a basis of classification must be of such a nature "as to mark the objects so designated as peculiarly "requiring legislation. *There must be a substantial* "*distinction, having a reference to the subject-matter* "*of the proposed legislation between the objects or* "*places embraced in such legislation and the objects* "*or places excluded.* The marks of distinction on "which the classification is founded must be such, in "the nature of things, as will in some reasonable de- "gree at least account for and justify the restriction "of the legislature."

Sutherland, Stat. Constr., Sec. 127.

In *Hammer* vs. *State* (44 N. J. L. 667), it is said: "Distinctions which do not arise from substantial dif- "ferences—differences so marked as to call for sepa- "rate legislation—constitute no grounds for support- "ing such legislation."

In *Dibrell* vs. *Lanier* (89 Tenn. 500), it is said: "Whether a statute be public or private, general or "special in form, if it attempts to create distinctions "and classifications between the citizens of this State, "the basis of such classification must be natural and "not arbitrary. * * * If the classification is made "under Art. I, Sec. 8, of the Constitution for the pur-

" pose of subjecting a class to the burden of some spe-
" cial disability, duty or obligation, there must be
" some good and valid reason why that particular
" class alone be subjected to the burden."

In *Pasadena* vs. *Stinson* (91 Cal. 238, 251), the Court say: "The conclusion is that, although a law is gen-
" eral and constitutional, when it applies equally to
" all persons embraced in a class founded upon some
" natural or intrinsic or constitutional distinction, it
" is not general or constitutional if it confers partic-
" ular privileges or imposes peculiar disabilities or
" burdensome conditions in the exercise of a common
" right upon a class of persons arbitrarily selected
" from the general body of those who stand in pre-
" cisely the same relation to the subject of the law."

And also see:

Kansas City vs. *Griesh*, 52 S. W. Rep. 286;

Darcy vs. *San Jose*, 104 Cal. 642;

Ex Parte Jentzsch, 112 Cal. 468;

Sutton vs. *State*, 33 L. R. A. 589;

Ex Parte Westerfield, 55 Cal. 550;

Re Garrabad, 19 L. R. A. 858;

Demoville vs. *Davidson*, 87 Tenn. 214;

Ill. C. R. Co. vs. *Crider*, 91 Tenn. 490;

Ragio vs. *State*, 86 Tenn. 272;

St. Louis vs. *Spiegel*, 90 Mo. 587;

In re Eight-Hour Law, 39 Pac. Rep. 328; 20 Colo. 279;

Tacoma vs. *Krech*, 46 Pac. Rep. 255; 15 Wash. 296.

State vs. *Allen*, 94 Tenn. 674;

Daly vs. *State*, 13 Lea. 232;

State vs. *Hammer*, 42 N. J. L. 435, 440;

Van Riper vs. *Parsons*, 40 N. J. L. 123;

Rutgers vs. *New Brunswick*, 42 N. J. L. 51.

In concluding this point we cannot do better than to quote further from the case of *Cache County* vs. *Jensen*, *supra*, a case on all fours with the case at bar, and to which, in its entirety, we most earnestly desire to call the Court's attention:

"Sheep-raising is one of the chief industries of this "commonwealth, and there appears to be no other "known use to which the vast areas of our western "desert lands can be so profitably put. The business "does not belong to that class of occupations which "are demoralizing in their tendencies. It is useful, "commendable and ancient as civilization itself. From "time immemorial it has been regarded as indispen-"sable to the comfort of the public. Why then single "out this particular business to burden it with a tax "which, under existing conditions, must be regarded "as prohibitory, and permit the raising of cattle and "horses and every other occupation to be carried on "without license? Counsel for the respondent sug-"gests that the business of sheep-raising needs some "degree of regulation, and doubtless this is true; for "where large bands of sheep are herded, the public "welfare, in all probability, requires that there be

" regulations and protection, but the answer to the " suggestion is that the ordinance provides for neither. " If it had been designed to regulate and protect, it " would possess some merit, but it was manifestly in- " tended for no such purpose. Whatever may have " been the intention of the Board of Commissioners, " their enactment is one for revenue only, and it is so " unequal and oppressive that it cannot be upheld. The " fee enacted is a tax, and not a license, and if the " power thus attempted to be exercised were to be " sanctioned, it is perceived that regulation would not " long be necessary; for the tendency would be to " drive the business out of the county and out of the " State, if the other counties would follow the example " and exercise the power."

But even if it should be held that the tax is imposed upon the business, not upon the animals, still it is not uniform.

As we said in *State* vs. *Endom* (23 La. Ann. 663): " It is contended by the defendant that this is a direct " and specific tax on the articles enumerated, while the " attorney for the State insists that it is a *license* for " the exercise of an occupation or trade. It is called " a *license* at the beginning of Section 3, and that sec- " tion is in that part of the law relating to persons, " trades, professions and occupations subject to tax- " ation. On the other hand, from the terms of the law, " the license is to be levied and collected from the " *objects* enumerated. But it is immaterial whether " it be a specific tax, or tax on trades, occupations, etc. " In either case it violates the Constitution. It was

"no doubt intended to be a tax on occupations or "trades. In that event it is a license for the right "or privilege to pursue the several callings taxed, "and the tax for this privilege must be *the same* for "all persons who engage in the business, without ref- "erence to the amount of capital invested or business "done. If A keeps one dray and B keeps two drays, "they both follow the same occupation or business, "and it would be unequal to tax one more than the "other for the privilege of engaging in it. To do so "would be not to tax the business, but the drays owned "by each."

And again it is said in *New Orleans* vs. *Ins. Co.* (23 La. Ann. 449): "The Constitution requires that a "license tax, as well as a tax on property, shall be "equal and uniform. To be equal and uniform the "tax imposed must be the same upon all who engage "in the particular profession or calling taxed without "reference to the abilities, fortunes, or successes of "those engaging in the business taxed."

See also Hilliard on Taxation, p. 32.

It may be contended that the privilege of pursuing the "licensed" business or occupation is a property right and as such it must be taxed in proportion to the value of the business. But even so the ordinance is invalid, for the business is not taxed proportionately to its value. The value of a business is not to be measured by the value of the stock on hand, but by its profits. It is evident that the value of the business of an agistor pasturing one thousand head of sheep on

contract, is not the same as that of a stockraiser feeding a similar number for market, yet by this ordinance they are equally taxed. The tax is levied quite irrespective of the ownership of the sheep "used in the "business," and of the profits and value of the business.

(3). Section 1 of Article XIII of the Constitution of California provides that, "All property in the State "not exempt under the laws of the United States shall "be taxed in proportion to its value, to be ascertained "as provided by law." Section 3627 of the Political Code provides that, "All taxable property must be "assessed at its full cash value."

The ordinance provides for no assessment, but imposes a specific tax of ten cents per head.

In the premises it is respectfully submitted that the judgment of the Circuit Court be reversed.

JOSEPH C. CAMPBELL,
Attorney for Petitioner.

THOMAS H. BREEZE,
Of Counsel.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 121.

P. L. FLANIGAN, PETITIONER,

vs.

THE COUNTY OF SIERRA, RESPONDENT.

Upon the point that the repeal of a statute without a saving clause abates all suits pending under the provisions of the statute repealed, counsel for the petitioner refers to the following authorities additional to those cited in the printed brief:

Garrison *vs.* City of New York, 21 Wall. 196.
Louisiana ex rel. *vs.* New Orleans, 109 U. S. 285.
Freeland *vs.* Williams, 131 U. S. 417.
United States *vs.* Tynen, 11 Wall. 88.
Norris *vs.* Crocker et al., 13 How. 429.
State of Maryland, Use, etc., *vs.* B. & O. R. R. Co., 3 How. 534.

C. C. COLE,
Of Counsel for Petitioner.

In the Supreme Court of the United States

P. L. FLANIGAN,

Petitioner,

vs.

THE COUNTY OF SIERRA,

Respondent.

BRIEF FOR RESPONDENT

The brief of petitioner fairly states the case, except the unintentional omission of a portion of section 2 of the ordinance. Said section 2 is as follows:

"SECTION 2. Each and every person, co-partner-"ship, firm or corporation, who may engage in the "business of raising, grazing, herding or pasturing "sheep within the County of Sierra, State of Califor-"nia, in order to procure a license therefor, must "present to the License Collector of said county, at "the time of making application therefor, the affidavit "of such owner, his foreman, agent or person in "charge of such sheep, showing the number of sheep "owned by, and in the possession of, and under the "control of such applicant for license within said "county, and upon presenting such affidavit and the "payment of the license tax, as prescribed in Section

"1 of this ordinance, the applicant shall be granted "a license to raise, graze, herd or pasture sheep within "the said County of Sierra.

"The Collector, or his deputy, may administer all "oaths under this section, and must do so without "charge."

Petitioner contends:

1. That the ordinance under which this action was commenced was repealed by the act of the legislature of the State of California of March 23, 1901, and hence the action is abated, and argues:

(a). That the ordinance is "by its very terms" a revenue measure, and hence repealed, and

(b). That the right upon which respondent founded its action is penal in its nature and hence the repeal destroyed the remedy, and that the cause of action became as though it had never been.

2. That the ordinance is in conflict with the Constitution of the State of California, (1) it imposes double taxation; (2) it is not uniform in its operation, and, (3) it levies a tax without a prior assessment. And argues

(a). That the license is a tax on the animals and not on the business.

(b). That the sheep within the county have already been assessed and taxed for the purpose of revenue and that the ordinance imposes an additional tax for the same purpose.

(c). That all the sheep in the county are not taxed, and

(d). That the same tax is placed on all kinds of sheep and on lambs as well as sheep.

Respondent contends:

1. That the ordinance was passed in the exercise of police power and for the purpose of regulation, and was not, therefore, repealed.

2. That when petitioner commenced to do business in the county he became indebted to respondent in the amount due for the license. The right to the sum due vested in the county; hence no repeal could affect it.

3. That all constitutional questions raised have been decided adversely to petitioner by the Supreme Court of the State of California.

The ordinance was passed in the exercise of police power and for the purpose of regulation, and was not, therefore, repealed.

It is conceded that the power of the Board of Supervisors of the county to license for purpose of revenue was repealed by the Act of the Legislature of the State of California of March 23, 1901, (Cal. Stat. 1900, Chap. CCIX., p. 635, hereinafter cited as Section 3366, Pol Code); but even so it does not necessarily follow that the ordinance in question here was repealed. If, as petitioner contends, the ordinance *by its very terms* is a revenue measure, then, certainly the ordinance was repealed; but, if the ordinance is a regulatory measure, the contrary would follow as a matter of course. At the time of the passage of the ordinance the laws of California contained two grants of power to the legislative body of the county authorizing its enactment, one found in the Constitution and one in the General Laws.

The Constitutional provision is as follows:

"Any county * * * may make and enforce "within its limits all such local, police, sanitary and "other regulations as are not in conflict with general "laws."

California Const., Art. XI, Sec. 11

The County Government Act provided:

"That the Board of Supervisors in their respective "counties shall have jurisdiction and power under "such limitations and restrictions as are prescribed by "law to license for purposes of regulation and revenue "all and every kind of business not prohibited by law,

"and transacted and carried on in such county * * * to fix the rates of license tax upon the same "and to provide for the collection of the same by suit "or otherwise."

County Government Act, Sec. 25, Sub. 25, Stat. 1897, p. 465.

"Of the power of the State to authorize the license "of all classes of trades and employments, there is no "doubt * * * But a legislative grant of power "to a municipal corporation to license business, etc., "within its corporate limits, does not necessarily in- "clude a power to impose license for revenue pur- "poses.

"The distinction between the two powers is well "recognized. Imposing licenses for regulating busi- "ness, etc., is an exercise of the police power, while "imposing them for revenue purposes is an exercise "of the taxing power." (Citing 2 Dillon Mun. Corp., Sec. 768.) "It may therefore be questionable whether "before the Constitution of 1897 the city had under its "Charter power to impose licenses for purposes of rev- "enue; but under the provisions of the Constitution "which we have quoted (Secs. 11 and 12, Article XI.) "there is no doubt of the power of municipalities to "impose licenses for the purposes of regulation, or "revenue, or both regulation and revenue."

In re Guerrero, 69 Cal. 90.

"We do not deem it necessary to discuss the ques- "tion as to whether the license in question is imposed "for revenue purposes or for the purposes of regula- "tion, for the reason that the Board possessed author- "ity to impose it for either, or both." (Citing *Ex parte Mount*, 66 Cal. 448).

Ex parte Mirande, 73 Cal. 374;
See also *County* of *El Dorado* v. *Meiss*, 100 Cal. 270;
County of *Inyo* v. *Erro*, 119 Cal. 120.

In *ex parte Mount* the ordinance in question provided that every person or firm or corporation who at any fixed place of business sold any goods, wares or merchandise, whether on commission or otherwise (except such as were sold by auctioneers under license) should obtain from the License Collector a license, and pay therefor the amount of money to be determined and regulated by the amount of sales made or business transacted. The ordinance then proceeded to graduate the amount of license required to be paid in proportion and according to the amount of sales or business transacted by the person or firm, and the Court say as follows:

"It is claimed that Section 4 of the Act simply pro-"vides that the City Council shall have power to make "regulations for licensing, taxing and regulating all "such vehicles, business and employments as the pub-"lic good may require, but that it contains no express "grant of power either to issue or grant or to require "a license to collect any money or tax therefor, but we "are of the opinion that the power of regulating or to "make regulations was sufficient, and that it carries "with it and includes the power to pass an ordinance "requiring a license to be taken out, as was done by "the ordinance in question * * * It seems to us "very clear that the power exercised by the Common "Council and complained of in this case was vested in "that authority by the Act of 1862 amendatory of the "City Charter, and that the delegation of such power "by the Legislature was constitutional is equally clear. "It comes within what is known as the police power "for regulation, and is properly vested in the munici-"pality."

In the case respondent made the point that the ordinance was authorized by Sections 11 and 12 of Art. XI of the Constitution of 1879, in reference to which the Court say:

"But we think the second ground relied on by re-"spondent in support of the ordinance is equally "strong and unanswerable."

"By section 2 (II), Art. XI of the constitution it is "provided: 'That any city, town or township may "make and enforce within its limits all such local, sani- "tary, and other regulations as are not in conflict with "general laws.' Here the delegation of power by the "organic law is very broad and comprehensive, and "we have had occasion in several cases to construe the "foregoing section of the constitution. (Court cites "Ex parte Walters, 65 Cal. 269; Ex parte Moynier, "65 Cal. 33)."

Thornton, Judge, concurring says:

"It is unnecessary to decide whether the power with "which the City Council is by the Act of 1862 invested "springs from the police power or the power to tax "and raise revenue. The power is given and can be "amply given under either source of authority. "(Const. Art. XI. Secs. 11 and 12.)"

Ex parte Mount, 66 Cal. 448.

"The ordinance is authorized by the Legislature, "and is a part of the local police regulation of the city "and relates to matters within the city. Our attention "has not been called to any general statute which, in "terms, or by application, prohibits the imposition of "a license tax as a police regulation."

Ex-parte Ah Toy, 57 Cal. 92.

"All doubts are to be resolved in favor of its valid- "ity, and likewise all proper presumptions are to be "invoked to that end. For these reasons alone the "Court feels justified in construing the words 'license "tax as synonymous with 'license fee or charge'; for "the words 'license tax' do not necessarily and always "mean a 'license tax' assessed and collected for pur- "poses of revenue."

Ex parte Pfirrman, 134 Cal. 147.

"The power to make these regulations is by this "section (Sec. 11, Art. XI. of the Constitution) con- "ferred upon the city as well as upon the county, and "must be held to be equally authoritative in each. It "is a portion of the law-making power which the peo- "ple through their Constitution have conferred upon "these respective bodies, and its exercise is entitled to "the same consideration and to receive the same "obedience as that portion of the same power which by "the same instrument has been conferred upon the "legislature. The regulations made under this au- "thority are none the less a part of the law because the "authority to make them is conferred immediately by "the Constitution than if it had been conferred imme- "diately through an Act of the Legislature."

Ex-parte Roach, 104 Cal. 276.

In addressing itself to the power of the Board of Supervisors of a county to license, the Supreme Court of California in a late case say:

"But aside from the County Government Act, am- "ple and full power is given to the Board of Supervi- "sors by Art. XI. of the Constitution 'any County, "City, Town or Township may make and enforce "within its limits all such local, police, sanitary and "other regulations as are not in conflict with general "laws.'"

County of Los Angeles v. *Eikenberry,* 131 Cal. 461.

From the above authorities it is apparent that the county was authorized by Section 11 of Article XI of the Constitution to pass an ordinance as an exercise of its police power and for purposes of regulation licensing the business of raising, grazing, herding and pasturing sheep unless the ordinance in some way conflicted with general laws. If the ordinance can be construed to be passed for purposes of regulation it would not conflict with any general law to which at-

tention has been called. It is only by construing the ordinance to have been passed for purposes of revenue and not for regulation that it can be claimed to be in conflict with a general law, (Sec. 3366, Pol. Code, Cal.) and hence without the protection of the Constitution. This brings up the question is the ordinance "by its very terms" a revenue measure? If it is not, it is plain that much of the force of petitioner's argument on the point is lost. The ordinance on its face does not express whether it was passed for the purposes of revenue or for regulation, and whether it was for one purpose or the other depends upon whether or not, on any reasonable theory, the legislative body which passed it had the power to exact a license fee of ten cents a head on the business of raising, grazing, herding and pasturing sheep for the purpose of recompensing the county for the necessary expense of issuing the license, the expense attending direct regulation and oversight, and the incidental cost to which the county is subjected in providing for and maintaining a proper system of supervision. The only office of the ordinance is to fix the fee, provide for its collection, and for the issuance of the license, and whether the demand of the fee by the county evidenced the exercise of the police power of its legislative body or its intention to tax for purpose of raising revenue would depend upon the purpose for which the ordinance was passed; the form of the ordinance would not control unless, probably, its purpose was expressed upon its face, but in the absence of such expression the form might be the same in both instances, (*Cooley* on *Taxation*, p. 586) and in determining what fee is reasonable, the legislative body may take into consideration the cost of issuing the license, collecting the fee, regulating and supervising of the business, and whatever extra cost the county may be put to on account of this particular businss being transacted in the county.

"Moreover in fixing upon the fee, it is proper and "reasonable to take into account not the expense "merely of direct regulation, but all the incidental con- "sequences that may be likely to subject the public to

"cost in consequence of the business licensed. In some "cases the incidental consequences are much more im- "portant, and ,indeed, are what are principally had in "view when the fee is decided upon."

Cooley on Taxation, p. 599.

See also,

1 *Tiedman on State and Federal Control of Persons and Property*, p. 483.

The ordinary expenses of government are raised by the usual State, county and municipal tax levy, and estimates can be made that will approximate the ordinary cost of government; but not so in the matter of police regulation as applied to licensed business; that will depend upon many things which cannot be foreseen.

The cost of regulating the business of raising, etc., sheep, will depend largely upon the number of persons who engage in it. If none engage in the business, no cost will accrue, but if a large number engage in the business a large cost is the inevitable result; but who can foresee the number who may visit the county for the purpose of engaging in this business?

The incidental consequences, damage to roads and trails consequent on large bands of sheep crossing and recrossing; fires started by careless sheepherders, etc., are likewise uncertain in the same proportion.

"The plain purpose of the charter provision quoted "is to authorize the council to control and regulate "the business by means of the license and the fee the "general purpose being to promote order, to protect "buyers from imposition, etc., and not to suppress the "business, or raise revenue. The fact, however, that "the city derives a revenue incidentally from the rea- "sonable exercise of the police power in regulating

"and controlling the business is no serious objection "to such an ordinance."

City of St. Paul v. *Coulter,* 12 Minn. 16.

This Court in a late case has considered the matter, and say:

"In *Wiggins Ferry Co.* v. *E. St. Louis,* 107 U. S. "376 (27 L. Ed.), where a ferry company authorized "by an act of Assembly of the State of Illinois to carry "on its business and paying State taxes prescribed in "its charter, was called upon by a city ordinance to "pay a license tax, it was held by this Court that the "exaction of a license fee is an ordinary exercise of "police power by municipal corporations; that the "power of the State to authorize any city within its "limits to enforce a license tax on trades or callings "generally, especially those which are quasi public, "cannot be disputed, and that whether a license fee is "exacted under the power to regulate or the power to "tax is a matter of indifference if the power to do "either exists."

Postal Telegraph Cable Co. v. *Charleston City Council,* 153 U. S. 691 (38 L. Ed. 871).

By an ordinance passed in 1894 the Borough of New Hope, Pennsylvania, imposed an annual license fee of $1.00 per pole and $2.50 per mile of wire on the telegraph, telephone and electric light poles and wires within its limits. The Western Union Telegraph Company had constructed prior thereto, and had afterwards maintained and operated, a line of telegraph poles and wires through the borough, but had refused to pay the license fee. Action was brought to recover the license fees for four years, commencing with 1895. Evidence was given in the case as to the local business handled over these wires by the company, its own cost of inspection, repairs and maintenance, and also testimony tending to show that the borough did nothing in the way of inspecting or repairing or re-

moving or anything else in connection with the poles and wires of those telegraph companies. The point was made that the fee was unreasonable for the purposes of regulation.

Mr. Chief Justice Fuller delivered the opinion of the Court, which is in part as follows:

"It is conceded that the borough had the right, in "the exercise of its police power, to impose a reason- "able license fee upon telegraph poles and wires within "its limits, and that an ordinance imposing such fee is "to be taken as prima facie reasonable. * * * * " * While in the exercise of its control over its "streets it is admitted that the borough may supervise "the location of the poles erected to sustain the wires "of the plaintiff in error, may require them to be "marked, may make inspection of them as may be "necessary to protect the public welfare, and may im- "pose a reasonable license fee for the cost of such reg- "ulation and supervision and of the issuing of such "permits as may be required for the enforcement "thereof, yet it is contended that if the license fee "turned out to be in excess of the amount necessary "to reimburse the municipality the ordinance became "unreasonable and invalid. * * * * * * * * "In *Taylor* v. *Postal Teleg. Cable Co.*, 202 Pa. "583, 52 Atl. 128, the Supreme Court said: 'Clearly " 'the reasonableness of the fee is not to be measured " 'by the value of the poles and wires or of the land " 'occupied, nor by the profits of the business. The " 'elements which enter into the charge are the neces- " 'sary or probable expense incident to the issuing of " 'the license and the probable expense of such in- " 'spection, regulation, and police surveillance as " 'municipal authorities may lawfully give to the erec- " 'tion and maintenance of the poles and wires.

Western Union Telegraph Company v. *New Hope*, 187 U. S. 419 (23 Sup. Ct. Rep. 204).

In a similar case in which Mr. Justice Brewer de-

livered the opinion of the Court, this Court say as follows:

"When it (the license tax) is authorized only in "support of police supervision, the expense of such su- "pervision determines the amount of the charge; and, "if it were possible to prove in advance the exact cost "that would be the limit of the tax. In the nature of "things, that, however, is ordinarily impossible; and "so the municipality is at liberty to make the charge "large enough to cover any reasonable anticipated ex- "penses. It is authorized to fix such charge in advance "and need not wait until the end of the period for "which the license is granted. It may not act arbitrar- "ily or unreasonably, but the risk may rightfully be "cast upon the license, and the charge cannot be "avoided, because it subsequently appears that it was "somewhat in excess of the actual expense of the "supervision."

"The expenses attending direct regulations and "oversight are not only to be considered, but also the "incidental cost to which the municipality is subjected "in providing for and maintaining a proper system of "supervision. We cannot undertake to specify all the "particulars which should be brought into view where "the reasonableness of a municipal ordinance is chal- "lenged in a Court but we think that the rule laid "down in Cooley, Const. Lim. (Ed. 1886), p. 244, may "be safely adopted: *'A municipal corporation may im-* " *'pose, under the police power, such a charge for the* " *'license as will cover the necessary expenses of issu-* " *'ing it, and the additional labor of officers and other* " *'expenses thereby incurred.'* ". (Italics ours.)

Atlantic and Pacific Telegraph Company v. *Philadelphia*, 23 Sup. Ct. Rep. p. 817.

In another Federal Court presided over by a Justice of this Court, it is said:

"It must be regarded as settled that it is lawful for "a state to impose taxes upon property owned and "used within it by a corporation of another state, even

"when such corporation is engaged in interstate com-
"merce, and that the exaction of a license tax is a valid
"exercise of power by municipal corporations, in order
"to cover expenses to which they may be put in the
"enforcement of their police rules and regulations.
"Telegraph Co. v. Attorney General, 125 U. S. 530, 8
"Sup. Ct. 961; License Tax Cases, 5 Wall. 462; Wig-
"gins Ferry Co. v. City of East St. Louis, 107 U. S.
"365, 2 Sup. Ct. 257; Postal Tel. Cable Co. v. City of
"Charleston , 153 U. S. 692, 14 Sup. Ct. 1094. But
"these propositions are not disputed by the plaintiff in
"error. It is, in fact, conceded that the charges in
"question were imposed under the police power, and
"are valid if they are reasonable in their amount and
"in their mode of collection. The claim is that such
"charges, to be reasonable, must be limited to such
"amount as is necessary to reimburse the municipality
"for the expenses to which it is subjected in the en-
"forcement of such inspection rules and regulations as
"it may lawfully enact, and that in the present case the
"amount of the charges imposed by the ordinances is
"excessive, and so far above the reasonable expenses
"of the city that the ordinances are void. Whether the
"ordinances are reasonable can be judicially inquired
"into. When it is said, in some of the cases, that such
"a question is for the determination of the Court, it is
"not meant that the question may not properly be sub-
"mitted to a jury. What is meant by such observations
"is that Courts are not precluded from considering the
"reasonableness of the legislative act prescribing the
"terms and amount of the charges. It has sometimes
"been urged that such questions are peculiarly suited
"for legislative determination. And it must be ad-
"mitted that there is a presumption in favor of the va-
"lidity of the action of the legislative body, and that
"the evidence to justify a Court in holding otherwise
"must be clear and convincing. Still it must be re-
"garded as conclusively settled that the legislative au-
"thority to impose license fees or charges is not abso-
"lute, and must be exercised with due regard to the
"rights of the corporations to be affected.

"Regarding, then, the issue to be tried as one of "fact, we think it is one which, from its nature, is emi- "nently fit for the determination of a jury. The ex- "penses attending direct regulations and oversight are "not only to be considered, but also the incidental cost "to which the municipality is subjected in providing "for and maintaining a proper system of supervision. "We cannot undertake to specify all the particulars "which should be brought into view where the reason- "ableness of a municipal ordinance is challenged in a "court; but we think that the rule laid down in Cooley, "Const. Lim (Ed. 1886), p. 242, may be safely adopt- "ed: 'A municipal corporation may impose under the " 'police power such a charge for the license as will " 'cover the necessary expenses of issuing it, and the " 'additional labor of officers and other expenses there- " 'by incurred.'

"Not only is there a presumption in favor of the va- "lidity of the action of the legislative body, but the "facts upon which that action proceeds are so numer- "ous, and so liable to frequent changes, courts should "act cautiously in dealing with such a case, and admit "evidence of all the facts and circumstances that seem "to bear, even somewhat remotely, upon the issue. As "was said by the Supreme Court of Pennsylvania, in "Allentown v. Telegraph Co., 148 Pa., St. 119, 23 Atl. "1070 the amount of the license charges rests with the "city councils in the first instance, and it is only where "such discretion has been manifestly abused that the "courts are justified in interfering.

"In this view of the peculiar nature of the case, we "think the trial court erred in excluding the evidence "offered on behalf of the city, going to show that con- "siderable additional expense, in providing a greater "number of fire companies and apparatus, is rendered "necessary by the electric wires suspended in the "streets. If, indeed, a new condition of affairs has "been caused by the erection of wires and poles in the 'thoroughfares of the city, which makes it proper for "the authorities, in order to protect life and property, "to increase its police and fire force and equipment, we

"think such a state of facts might be shown, and was a "proper matter for consideration in fixing the amount "of the license charges, and in passing upon their "reasonableness. So, further, we think there was "error in excluding the evidence offered of the expen- "ses to which the city is, from time to time, put in con- "nection with the meeting of its councils for the pur- "pose of regulating the erection of wires and poles."

Philadelphia v. *Western Union Tel. Co.*, 89 Fed. Rep., p. 460. Opinion by Shiras, Circuit Justice.

"Obviously their intention is to regulate. To ac- "complish this object a license is required. Before it "can be issued twenty-five dollars must be paid, not "as a tax, as denominated in one of the sections of the "ordinance, but a price for the ferry franchise or priv- "ilege. They prohibited any one from exercising the "ferry privilege until a license be granted, and require "the twenty-five dollars to be paid, and a bond to per- "form the duties of ferryman, with approved security, "to be executed before the license can be granted, "thereby showing that the twenty-five dollars are ex- "acted as a price of the privilege, and that the license "is required as a means of regulating. This being "true, the twenty-five dollars is a license fee, and not "a tax."

Chilvers v. *People*, 11 Mich. 43.

"The only question presented for our consideration "is, Is the fee fixed by the ordinance in question reas- "onable?

"The power to license and regulate, granted by "the statute, was conferred solely for police purposes, "and municipal corporations have no right to use it as "a means of increasing their revenues. They can re- "quire a reasonable fee to be paid for a license. The "amount they have a right to demand for such fee de- "pends upon the extent and expense of the municipal

"supervision made necessary by the business in the "city or town where it is licensed. A fee sufficient to "cover the expense of issuing the license and to pay "the expenses which may be incurred in the enforce- "ment of such police inspections or superintendence "as may be lawfully exercised over the business, may "be required. It is obvious that the actual amount "necessary to meet such expenses cannot in all cases "be ascertained in advance, and that 'it would be futile "to require anything of the kind.' The result is, if the "fee required is not plainly unreasonable, the Courts "ought not to interfere with the discretion exercised "by the council in fixing it, and unless the contrary "appears on the face of the ordinance requiring it, or "is established by proper evidence, they should pre- "sume it to be reasonable."

(Citing Burlington v. Putnam Insurance Co., 31 Iowa, 105-106; Van Hook v. Selma, 70 Ala., 361; Van Ballen v. People, 40 Mich., 258; Laundry License Cases (Or.), 22 Fed. Rep., 701; Johnson v. Philadelphia, 60, Pa., 245; ex parte Chin Yan, 60 Cal., 78; ex parte Gregory, 20 Tex. App., 210; State Center v. Barenstein, 66 Iowa, 249; Fisher v. Harrisburg, 2 Grant, 291; St. Louis v. Weber, 44 Mo., 547; Corrigan v. Gage, 68 Mo., 541; State v. Gas Co., 37 Ohio St., 45; Clason v. Milwaukee, 30 Wis., 316.)

"According to this rule we cannot say and it does "not appear that the fee required in this case is un- "reasonable. The contrary is presumed. Reversed."

City of Fayetteville v. *Carter*, 52 Arkansas, 301.

See, also,

Chilvers v. *People*, 11 Mich. 43.

Arkadelphia Lumber Co. v. *Arkadelphia*, 56 Ark. 370.

Ash v. *People*, 11 Mich. 347.

Littlefield v. *State*, 42 Nebraska, 223.

City of Jacksonville v. *Ledwith*, 26 Florida, 163.

Tomilson v. *Indianapolis*, 114 Ind. 142.
State Ex. Rel. White v. *Redmond*, 43 Minn., 250.
Marmet v. *State*, 45 Ohio, 63.
Ferry Company v. *East St. Louis*, 107 U. S., 365.

Petitioner refused to try the question of the reasonableness of the fee. He declined to answer and make the issue, and in the absence of a trial it must appear from the *face* of the ordinance that the fee is so excessive that the Court can infer as matter of law that the purpose of the ordinance was to raise revenue and not to reimburse the county for the cost of regulation of the business licensed.

Cooley on *Taxation*, p. 410; 1 Tiedman on State and Federal Control, etc., 483.
Glenn v. *Mayor*, 5 Hill & J., 424.
Ex parte Mirande, 73 Cal., 374.
In re Guerrero, 69 Cal., 95.
Merced County v. *Fleming*, 111 Cal., 46-51.
City of Brooklyn v. *Breslin*, 57 N. Y., 591-6.
County of Los Angeles v. *Eickenberry*, 131 Cal., 466.
Ex parte Pfirrman, 134 Cal., 143-7.
Price v. *People*, 193 Ill., 114.
St. Paul v. *Coulter*, 12 Minn., 41.
Grand Rapids v. *Brandy*, 105 Mich., 671.
Atkins v. *Phillips*, 26 Fla., 281.
Western Union Telegraph Co., v. *City of Philadelphia*, 12 Atlantic Rep., 144.
City of Uttumwa v. *Zekind*, 95 Iowa, 622.
City of Burlington v. *Unterkircher*, 99 Iowa, 401.
Vansant v. *Harlem Stage Co.*, 59 Md., 335.
Littlefield v. *State*, 42 Neb., 223.
People v. *Russell*, 49 Mich., 633.

The Legislature of California has expressly authorized the county to license and fix the rate of license tax.

"Where the grant is not made for revenue but for "regulation merely, a much narrower construction is to "be applied. A fee for the license may still be exacted, "but it must be such a fee only as will legitimately "assist in the regulation and of inspecting and regulat- "ing the business which it covers. If the state intends "to give broader authority, it is a reasonable inference "that it will do so in unequivocal terms."

Cooley on Taxation, p. 598.

Certainly in the case at bar the State has given the broadest authority possible in so far as it may give the county power to license for purposes of regulation, exercise its police power, and fix the rates of license tax upon the business licensed, and in the most unequivocal terms—here is found direct authority to fix a rate of license tax upon *all* businesses transacted in the county, and authority is also given to collect it by suit. Surely the Legislature contemplated that a sum of money should be exacted from the person transacting the business, something more than the cost of issuing the license.

See

Chilvers v. *People*, 11 Mich. 49.

The possibilities for expense to the county which can be directly attributed to this business are large, and in view of the law that most of the expenses of criminal prosecutions—the traveling expenses of the district attorney, and all expenses incurred by him in the detection of crime—the expenses incurred in the support of prisoners—fees of jurors—the accounts of the coroner—the fees of magistrates—the support of indigent sick—the contingent expenses of the county—the fees of constables (County Government Act, Sec. 228, Stat. 1897, 575-77), and in Sierra county the mileage of the sheriff and the fees of reporters (same Act, Sec. 205, p. 564-5, Stat. 1897), are all county

charges payable out of the general fund; the cost of the prevention and eradication of diseases among sheep is a county charge (Stat. 1889, p. 216), and that all indirect burdens laid upon the county by virtue of the sheep business being conducted in the county on such scale that one person grazes 25,000 sheep must be paid by the county, what Court can say that ten cents per sheep is excessive, with no other guide than the record in this case, and what the Court may judicially know?

If it could be shown at a trial of this action with the reasonableness of this license fee controverted, that this business is liable to degenerate into a nuisance by the county becoming overcrowded with sheep on account of the closing of pastures to that animal by forest reservations, settlements, etc., in other portions of the state, excellent authority has been cited for exacting a fee sufficient to restrict the number of those who might engage in the business, and as also appears from the following:

Certain defendants were convicted of peddling without a license, contrary to the provisions of a city ordinance entitled "Ordinance No. 19. Peddlers, how licensed," passed by the city council in the assumed exercise of the power granted them by the city charter "to license and regulate all peddlers doing business within the city," in which it was provided for the issuance of licenses and fixed the amount of the fee at $100 for a year, $60 for six months, $15 for a month, and $5 for one day. The point was made in the case that the ordinance was not a legitimate exercise of the police power to regulate peddling, but a mere tax for revenue purposes, as demonstrated by the unreasonable amount of the license fee exacted, and the fact that its provision in no way looked to the regulation or control of the business.

The Court say:

"The license fee exacted is somewhat large, and the "provisions of the ordinance looking to the regulation

"of the business of peddling are somewhat meager. "but the fourth section certainly contains provisions "tending to secure the orderly pursuit of the business; *"and the mere fact of exacting a license fee is one "method of restricting it, which is itself a legitimate "method of regulating some kinds of business.* The "latitude that is given to municipal bodies in fixing the "amount of license fees, and the duty of Courts not to "declare the amount thus fixed unreasonable, except "in very plain cases, have been fully considered by us "in former cases. (Citing cases). If this was a case "of one of the ordinary ligitimate kinds of business, "like that of butcher, baker, auctioneer, or the like, "which are not liable to become public nuisances, and "consequently no occasion or right existed to restrict "the number of persons who shall engage in it, it might "be a question whether the fee exacted would not be "unreasonable. But the evils liable to grow out of "some occupations may be such that their suppression "can only be attained to an appreciable degree by the "imposition of some restraint upon the pursuit of such "callings or kinds of business. In respect to the great "majority of occupations, no such evils are likely to "follow; and consequently it would not be competent "to attempt to restrain the number of those engaged "in them by the imposition of a large license fee. All "that could be required would be an amount sufficient "to pay the cost of issuing the license, and to defray "the expense of necessary police supervision. But "where the business is of such a nature that its prose- "cution will do damage to the public, or that it is liable "to degenerate into a public nuisance, then it is a legi- "timate exercise of the police power to impose a license "fee large enough to act as a restraint upon the number "of persons who might otherwise engage in such busi- "ness. Tied., Lim., 274 *et seq.*. (Second Ed. Vol. I "p. 484 *et seq.*) It is upon this principle that very "high license fees are exacted from those vending in- "toxicating liquors. Peddling, although in itself a "moral and lawful pursuit, is one of the kinds of busi- "ness which, if not thus restrained, is very liable to

"become a great nuisance, especially in cities, as al-
"most every one knows by actual experience; and in
"view of that fact it was a legitimate exercise of the
"police power vested in the City of Duluth to exact a
"license fee large enough to restrict the number of per-
"sons engaged in peddling, even although the sum was
"larger than enough to pay the cost of license and the
"expense of any police surveillance which the city
"might exercise over the business. In view of all the
"circumstances, we cannot say that the fee exacted is
"unreasonable."

City of Duluth v. *Krupp*, 46 *Minn*, 435.

"It is a matter of common knowledge and experi-
"ence that a fence will keep out cattle and horses that
"will not sheep or hogs. It is evident that in passing
"the statute cited relative to the running at large of
"hogs and the herding and grazing of sheep within
"two miles of dwelling houses, the legislature intended
"to further the public good and preserve the peace by
"preventing those conflicts which would naturally re-
"sult from the herding of sheep about the dwellings of
"settlers. The statutes were intended to promote the
"public good and avoid danger and injury to the citi-
"zen. They were also evidently intended to protect
"the health of the settlers, and as those questions are
"of legislative discretion and not judicial, we are not
"authorized to hold the statutes unconstitutional."

"It is contended by the appellant that every citizen
"has the right to pasture the public domain, and that
"if the statutes in question are held valid it amounts
"to taking property without due process of law. There
"is nothing in this contention. We know of no statute
"enacted by Congress which grants the citizen the
"right of pasturage upon the public domain, and coun-
"sel for appellant cites no such statute. Citizens graze
"their stock upon the public domain by sufferance of
"the general government, and not by virtue of any
"vested right."

Sifert v. *Johnson*,—Idaho—65, Pac. Rep. 710.

"In every state the keeping of livestock is under "police regulation. The clash of interest between "stock-raising and farming calls for the interference of "the state by the institution of police regulations, and "whether the regulations shall subordinate the stock-"raising interest to that of farming, or vice versa, in "the case of an irreconcilable difference, as is the case "in respect to the going at large of cattle, is a matter "for the legislative discretion, and is not a judicial "question. In the exercise of this general power of "control over the keeping of livestock, the state or "municipal corporation may prohibit altogether the "running at large of such animals and compel the own-"ers to keep them within their own enclosures."

2 *Tiedman Upon State and Federal Control of Persons and Property*, p. 838.

Again, continuing the speculation, it might appear that appurtenant to the mountain homes in many instances in Sierra county are small ditches conveying water for domestic purposes over the public lands of the United States, rights that had become vested by the appropriation of the waters of rivulets under state law, and in other cases long ditches appurtenant to mining claims, all of which are necessarily subject—the waters to pollution, and the ditches to injury—by large bands of sheep being herded across the ditches and in the watersheds and streams above.

It is no answer to say that the individual damaged has his action at law for damages or in equity for an injunction, for, discarding the propositions that it increases the business of courts, subjects the regular inhabitant of the county, and the public, to annoyance and cost, it causes a clash of interests, exasperates the citizen and leads to possible disorder, attempts to redress the wrong by force, consequent disturbance of the peace, and hence increased police expense.

Such a business, while not a public nuisance, *per se*, might under the circumstances above related be conducted so as to come within the definition of such

a nuisance, at any rate under such a state of facts it would be so detrimental to the welfare of a community as to justify the legislative body of the county in fixing a larger license fee for its regulation and supervision than in the case of a business where these features are absent.

"The state may interfere wherever the public inter-"ests demand it, and in this particular a large discre-"tion is necessarily vested in the legislature to deter-"mine, not only what the interests of the public re-"quire, but what measures are necessary for the pro-"tection of such interests."

Lawton v. *Steele,* 152 U. S. 135-38 Law Ed. 388.

The justification for "High License" in the case of the regulation of the liquor traffic is its being the indirect cause of increased cost to the public and that it is but just that the business which causes the increased cost should bear the burden. Of course it is not claimed here that the business of raising, grazing, herding and pasturing sheep is as harmful in its effect upon the public as the sale of intoxicating liquor by retail but it is claimed that the business largely increases the public expenditures of the county, which expenditures are made necessary solely by reason of this business. It is further claimed that the public lands of the county are the public pastures, the commons so to speak, and that the effect of the herding of large bands of sheep on the public lands is, that the sheep-herder has sole use of these public pastures, thereby excluding cattle-raisers, settlers, prospectors and pleasure-seekers from that part of the public domain, to the detriment of the county, and the country generally, hence it may be seen that the indirect burdens laid upon respondent by this business are capable of being approximated in a large sum when measured by their value in money.

The case of *Lawton* v. *Steele,* (152 U. S. 135), holds that it is the duty of the state to protect its fish-

eries because they are common to all; by force of the same reasoning it is the duty of the state to protect the public pastures, and the county would necessarily have the right to regulate the use of the pastures in such way as to make them most beneficial to the public.

It seems fairly deducible from the above authorities that the Court must presume and hold that the ordinance was passed as an exercise of the police power of the respondent and for purposes of regulation, in the absence of a finding that the fee is unreasonable after a trial of the issues.

Petitioner claims that the ordinance does not license the business of raising, grazing, herding and pasturing sheep, for the reason that it does not first "forbid or make illegal the carrying on of the business mentioned," and then consent that it may be carried on provided that a license is procured.

This is placing a narrow construction on the effect of the ordinance, when read in connection with the general laws of the State of California.

The Penal Code of the state (Sec. 435) provides:

"Every person who commences or carries on any "business, trade, profession, or calling, for the trans- "action or carrying on of which a license is required "by any law of this state, without taking out, or pro- "curing the license prescribed by such law, is guilty "of a misdemeanor."

The County Government Act (Cal. Stat. 1897, p. 465, Chap. CCLXXVII, Sec. 25, Sub. 25) provides that

"Any person, firm, or corporation transacting, or "carrying on such business without such license when- "ever prescribed is guilty of a misdemeanor," and the Supreme Court of the State has decided that a county of the State has no power to pass an ordinance punishing precisely the same acts which are punishable under the general laws of the State. (see *In se sic*, 73 Cal. 148, *Ex-parte Mansfield*, 106 Cal. 400, *Ex-parte Stephen*, 114 Cal. 282), hence it appears, that, when the ordinance and the general law are read together

transaction of the business is prohibited unless a license is taken out.

"If a statute inflicts a penalty for doing an act the "penalty implies the prohibition, and the thing is un-"lawful though there be no prohibitory words in the "statute." (1 Kent. Lecture XX, star paging 467).

"When a statute, with a view of affording protection "to the public, imposes a penalty for doing an act it "thereby prohibits it and renders it illegal. Thus, a "statute which imposes a penalty on a person who ex-"ercises, or occupies himself as a surgeon without be-"ing licensed, is a prohibition of such practice."

Sutherland on Statutory Construction, Sec. 335.

Therefore it is plain that the moment the license was prescribed by the county the transaction of the business was forbidden unless the license was taken out, hence the issuance of the license permits the person to transact the business.

The Supreme Court of the State of California has passed upon the point as follows:

"If, for example, the order provided no punishment "whatever for doing business without a license, but "merely provided what the license should be, it would "be valid, and the statute supplements it by making "the failure to comply with the order a crime, and pro-"viding the penalty."

Ex-parte Christensen, 85 Cal. 210, 212.

Again it is only a lawful business, and a business transacted and carried on in the county that the county can license—the grant of powers reads:

"To license * * * * * * * all and every

"kind of business *not* prohibited by law, and tran-
"sacted and carried on within the limits," etc.

Political Code, Cal. 3366; *County Gov. Act, Cal.* Sec. 25; Sub. 25 Stat. 1897, p. 465.

The decison in *Cache* v. *Jensen* was rendered in a case where there had been a trial on the merits, and much of the opinion is addressed to the facts of that particular case after a finding of facts showing that the raising, grazing, herding and pasturing of sheep in Utah was not detrimental to the public, and that the sheep were grazed in several counties in one season, one of the grounds for holding being that each county through which the sheep were herded might impose a license-tax and thus make the tax a burden.

The case is questionable authority here for several reasons: First, the Court expressly declines to follow the decisions of the Supreme Court of California, as appears from the following:

"Counsel for respondent states and relies on several "California cases where ordinances similar to the one "in question herein were held valid. It does not ap-"pear, however, from these decisions, that the condi-"tions under which sheep-raising is carried on in Cali-"fornia are similar to those under which the business "is conducted in this state; nor are the provisions of "the California constitution on the subject of taxation "the same as those in our constitution. But if, in both "states, all these things were similar, we should not be "inclined to follow these decisions."

Judge N. Baskin one of the judges, also dissented.

Again it does not appear that in the Utah constitution, counties have the right to legislate locally on these matters; and further it is submitted that on a careful reading the prevailing opinion is not sound in some particulars. For instance, the ordinance in question is condemned because it does not even contain a hint as to regulation of the business, nor that the

business requires any regulation, *"nor that the county will afford protection of any kind to the persons engaged in the business, nor that it is of such a character as to require regulation or protection."* (Italics ours.)

The power to license was for the purposes of regulation, and for this purpose to fix a fee to be paid. Now what regulation is contemplated? Certainly those police regulations as are needful to secure and preserve the public order and to protect each individual engaged in the business in the enjoyment of his own rights and privileges by requiring the observance of rules and order, fairness and good neighborhood by all around him. (Cooley on Taxation, p. 586.)

However it may be in Utah, in California the guaranty of such protection exists in its constitution and general laws without waiting the passage of the county ordinance to effect it.

In *Mayor* v. *Second Avenue* (32 N. Y., 261), the power under which the ordinance was passed did not expressly authorize the city to license nor to levy a license tax, and one of the reasons for the decision was that the city had already granted to the railroad the right to run its cars.

In *Merced County* v. *Helm* the Court determined *as matter of law* that the ordinance involved "by its very terms" was a revenue measure (the ordinance exacted $3,000 per quarter from all persons who sold liquor), and even as to the point decided, it has been held to have gone to the extreme verge of strictness. (See *Los Angeles* v. *Eikenberry*, 131 Cal. 467.)

From the fact that the ordinance provides that the moneys derived from the license tax "shall be paid over to the county treasury, as other moneys are, and be placed to the credit of the general fund of the county," petitioner concludes that the ordinance "by its very terms" is a fiscal, not a regulatory, measure, but in what way does that provision of the ordinance

indicate its purpose? It has been shown that most of the charges coming under the head of police charges are paid out of the general fund, so to that extent the money went into the proper fund. It may be admitted that road expenses are paid from the road fund, but the admission does no harm because the board of supervisors have power, under their general powers, to transfer from one fund to another.

"The board of supervisors * * * shall have "jurisdiction and power * * * * 18. To estab- "lish a salary fund and such other county funds as "they may deem necessary for the proper transaction "of the business of the county, and to transfer moneys "from one fund to another as the public interest may "require." (Stat. 1897, p. 463.)

Again the general law commands that all license money must be paid to the treasurer.

Sec. 3363, Political Code, Cal.

The fund into which the money, by the terms of the ordinance, is to be paid, furnishes no test as to whether the measure is for regulation or revenue, necessarily it cannot, for the reason that if the county has to pay the money out for the purpose of regulating the business licensed, and paying the extra cost made necessary by the transaction of the business in the county, what difference does it make which fund the money is paid into? Wherever put the county gets the credit for it, and it offsets the expenditure from any other fund.

"The money, collected by way of a license as a po- "lice regulation, may go into the state treasury for "general revenue purposes, and need not be devoted "specially to the relief of burdens which the prosecu- "tion of the trade, or occupation imposed on the state, "provided that the character of the occupation is such "that restrictions upon its pursuit looking to its partial

"suppression, would be constitutional, whatever their "character may be."

1 *Tiedman State and Fed. Control*, etc., 486.

In the case of *Cooley* v. *Board of Wardens* (2 Howard U. S. 313), it was held that the fact that an act imposing certain pilotage fees on vessels, appropriated the fees to charity, did not impress upon the act the character of a revenue measure.

In *Tomilson* v. *Indianapolis* (144 Ind. 142), the fee from a license on vehicles was applied to the repair of streets.

In *City of St. Paul* v. *Coulter* (12 Minn. 41), the money went into the city treasury without invalidating the ordinance.

In *Littlefield* v. *State* (42 Neb. 223), it went into the school fund.

Notwithstanding the legislative grant of power to license *all* and *every* kind of business and to fix the rate of license tax upon the same the Supreme Court of California held in *Sonora* v. *Curtin* (137 Cal. 583) that the board of trustees of a city cannot in *any way* or *manner* regulate the business or profession of practicing law, hence that as to some businesses no license ordinance would be valid under a power to license in the exercise of police power, and for purposes of regulation. Assuming this view of the law to be correct, the true test as to whether an ordinance is passed in the exercise of the police power, and for purposes of regulation, or as a fiscal measure, would be whether or not the business was a subject for regulation at all.

"When the calling is not dangerous to the public "either directly, or indirectly, it cannot be subjected to "any police regulation whatever which does not fall "within the power of taxation. But those occupations "which require police regulation because of their pe-"culiar character, in order that harm might not come

"to the public can be subjected to whatever police reg-
"ulation may be necessary to avert the threatened
"danger."

(1 *Tiedman on State and Federal Control,* etc., p. 482.)

So that in view of the California case above cited, and so much relied upon by petitioner, the ordinance does not fulfill the test as a revenue measure, but is regulatory, in character, at least, unless it can be successfully shown that the business is not in any degree harmful to the public, which it is submitted cannot be, to say the least, presumed. Now, following the authorities above cited, before the Court can assume, as matter of law that the ordinance is a revenue measure, guided solely by the amount of the license tax demanded, it must find that the tax is so excessive and unreasonable in amount, that under no reasonable state of facts will the amount claimed be needed to pay the expenditures ordinarily the result of such business being carried on in the county, and it is respectfully submitted that a trial of the action was necessary to determine the probable amount needed, which assertion ends the case unless the ordinance is subject to petitioner's contention that it is uncontitutional on other grounds.

All constitutional questions raised have been decided adversely to petitioner by the Supreme Court of the State of California.

It has been squarely held by the Supreme Court of the State of California that a license fee, or charge, is not a tax within the meaning of the constitutional provision that taxes must be uniform.

Santa Barbara v. *Stearns,* 51 Cal. 499;
See also *State* v. *Cassidy,* 22 Minn. 318;
Ex-parte Robinson, 12 Mo. 263.

The same argument by which it is claimed by respondent that the license fee charged is a tax on prop-

erty, and hence if the sheep used in the business had been assessed in the county could have been taxed there under the general levy, would apply to the licensing of any other business—the liquor business, say; the saloon building, liquors, chairs, tables, etc., of the saloon-keeper are assessed and taxed, yet it would hardly be claimed that if he was in addition required to pay a license fee, graduated according to the amount of business done by him, as a condition of doing business, that he could claim that he was doubly taxed, in the unlawful sense, even though the exaction of the fee did produce some revenue, as long as the revenue was needed by the county to pay the costs of the regulation and supervision of his business.

If the butcher, or farmer engage in the business of raising, grazing, herding or pasturing sheep he must pay the license fee.

The case of *Police Jury* v. *Nougues* (11 La. Ann. 739), can be distinguished from the case at bar. In that case the power conferred upon the police jury which levied the tax was as follows:

"To levy a tax on real and personal property and "slaves, upon sheep, vessels, steamboats or other "watercraft landing there for more than five days, ex- "cept the ferry, during the term of the privilege, upon "all wood-yards, carpenter yards, dry docks, livery "stables, bakeries, slaughter-houses, taverns, billiard- "tables, and upon all other objects liable to taxation."

The "objects liable to taxation" include "all persons pursuing any occupations, trades or provisions."

At first blush this case appears to be in point against respondent, but the decision can be accounted for by the fact that the constitution of Louisiana requires that a license tax shall be equal and uniform.

State v. Endon, 23 La. Ann. 663;
New Orleans v. *Iron S. Co.*, 23 La. Ann. 449.

Here the tax is upon the business, and the fee is laid at a certain amount on each sheep, so as to grad-

uate the fee according to the amount of business done. This is the purpose of the classification.

Again there is no constitutional provision in California which requires a uniform operation of municipal ordinances.

Hellman v. *Shoulters*, 114 Cal. 146;
County of Amador v. *Kennedy*, 70 Cal. 459;
Ex parte Haskell, 112 Cal. 416;
Ex parte Hurl, 49 Cal. 557;
See also *State* v. *French*, 41 Pac. Rep. 1078;
St. Louis v. *Green*, 6 Mo. App. 590;
Home Ins. Co. v. *City Council of Augusta*, 50 Ga. 530;
Ex parte Robinson, 12 Nev. 263.

The cases upon this proposition are almost unanimous, and when opposed to the rule are so on account of some special reason not found in this case. If the Court desires to pursue the matter further, most of the cases will be found quite fairly digested at sections 8, 9 and 10 of Licenses, Vol. 32, *Century Digest*, columns 2508 to 2519.

"Certainly, if a charge of five cents a head as in the "seventh class had been imposed upon all sheep, it "would have been more in harmony with the principle "of uniformity and equality declared in the constitu- "tion with reference to taxation."

Cache County v. *Jensen*, 61 Pac. Rep. 303, 307.
See also *Ex parte Sisto Li Protti*, 68 Cal. 635.

"Herding and grazing stock is or may be a business, and it is upon such business that the license is imposed. "That the property used in any particular calling is "subject to and has paid a property tax *ad valorem* " * * * does not interdict the right to impose a

"license upon the business in which such property is "used."

Ex parte Mirande, 73 Cal. 375.

This case disposes of all of the constitutional questions raised.

See also

County of El Dorado v. *Meiss,* 100 Cal. 270;
Sacramento v. *Crocker,* 16 Cal. 122;
Sikes v. *Mayor,* 55 Miss. 115.

All persons engaged in the business of raising, grazing, herding and pasturing sheep are required to procure a license so that the point as to the arbitrary selection has no force. Under decisions cited by respondent, following and including *Pasadena* v. *Stinson* (91 Cal. 238), the selection of a class of persons who raise, graze, herd and pasture sheep would be a proper classification.

When petitioner commenced to do business in the county he became indebted to respondent in the amount due for the license. The right to the sum due vested in the county; hence no appeal could affect it.

It was upon this point that the case was decided by the Circuit Court of Appeals, and the point can only arise in case the Court first decides that the ordinance is a revenue and not a regulatory measure. The opinion in the case fairly presents the point and respondent adopts the opinion as a part of this brief as follows:

"This action was brought by the county of Sierra in the State of California to recover of and from the plaintiff in error herein a lecense tax of two thousand five hundred dollars, it being alleged that the said plaintiff was engaged in that county in the business of sheep raising without having first paid the license tax required by ordinance number 54, passed by the board of supervisors of Sierra county, May 31, 1900. This ordinance consists of ten sections, which are set

forth at length in the complaint. The first section reads as follows: "Each and every person, copartnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the county of Sierra, State of California, must anually procure a license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm or corporation, and used in such business in said county." This ordinance went into effect June 15, 1900, and ten days thereafter this action was brought. At the time this ordinance was enacted, the board of supervisors of each county of California was authorized, subject to the restrictions and limitations imposed by the constitution and general laws, to license for the purposes of regulation and revenue, all and every kind of business carried on in the county. (Stat. Cal., 1897, 465.) On March 23, 1901, a new section was added to the Political Code of the State of California to be known as section 3366, which repealed the authority of the board of supervisors to license for revenue. (Stats. Am. Code Cal., 1900, 1901, 635.)

The averments in the complaint are sufficient to entitle the county to recover provided the ordinance referred to is constitutional, in all respects valid, and of full force and effect so far as this case is concerned.

The defendant in the court below (plaintiff in error) interposed a demurrer to the complaint on the general ground "that said complaint does not state facts sufficient to constitute a cause of action." This demurrer was overruled "with leave to defendant to answer within twenty days." No answer being filed the Court directed judgment to be entered in favor of the plaintiff, as prayed for in the complaint. From this judgment a writ of error is brought to this Court to have the alleged errors therein corrected. There are five assignments of error which counsel for plaintiff in error have conveniently grouped under three propositions, viz.:

"(1) The ordinance in question is an unjust, dis-

criminating, oppressive and unconstitutional exercise of the power to license for the purposes of revenue.

(2.) By the repeal of the statute authorizing boards of supervisors 'to license for purpose of regulation and revenue' and restricting their power to license 'in the exercise of their police powers and for the purposes of regulation as herein provided, and not otherwise,' without any saving clause in favor of pending suits or unpaid license taxes, the legislature of the state destroyed the cause of action which it had authorized the board of supervisors to create, denied any remedy for its enforcement and abated this action.

(3.) The ordinance is a revenue, not a regulation measure. As an ordinance for purpose of regulation, it is illegal and void, because it does not regulate, and the fee charged is so unreasonable that the courts will, as a matter of law, declare that its real purpose is revenue and not regulation, and therefore void as a pretended exercise of the police power."

In the consideration of the various questions raised in this case, it must be remembered that at the time of the passage of the ordinance herein involved, it was expressly authorized by the "Act to establish a uniform system of county and township governments," approved April 1, 1897. (Stat. 1897, Sec. 25, p. 465.)

The validity of similar ordinances—where several constitutional and other objections were raised—has been frequently sustained by the Supreme Court of California.

In re Guerrero, 69 Cal. 88, 91;
Ex parte Mirande, 73 Cal. 365, 372;
County of El Dorado v. *Meiss*, 100 Cal. 268;
County of Inyo v. *Erro*, 119 Cal. 119;
County of Los Angeles v. *Eikenberry*, 131 Cal. 461, 465, 466.

These decisions are binding upon this Court, and will be followed regardless of the decisions, upon similar questions, in other states. (*Williams* v. *Gaylord*, 102 Fed. 372, 374 and authorities there cited; *id.*, 186

case U. S. 157,167.) It is however claimed that the case in hand presents other objections that were not considered or decided in the decisions above referred to.

. The statute of 1897, among other things, authorized the board of supervisors to pass ordinances "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county * * * to fix rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise."

In 1901 the legislature passed "An act to add a new section to the Political Code of the State of California, to be known as section 3366, relating to the powers of boards of supervisors, city councils, and town trustees, in their respective counties, cities and towns, and to impose a license tax," approved March 23, 1901. (Stat. and Amend. to Codes, 1901, 635.)

Section 3366 reads as follows: "Boards of supervisors of the counties of the state, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions, * * * to fix rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

The Supreme Court of California has held that section 3366 repeals, by implication, the prior act of 1897, in so far as the same relates to the power to collect a license tax for revenue, thus restricting the licensing power of boards of supervisors, under the act of 1897, to matters of regulation alone.

Ex parte Pfirrman, 134 Cal. 143, 147, 148;
City of Sonora v. *Curtin*, 70 Pac. 674;
Town of Santa Monica v. *Guidinger*, 70 Pac. 732.

What effect does this repealing act have upon the present action which was brought under the provisions of the law of 1897, before it was repealed?

Counsel for plaintiff in error contend, that inasmuch as the law under which the ordinance for revenue purposes was passed, has been repealed, the ordinance is repealed as to all such purposes, and must be regarded as if it never existed except for the purposes of those actions which were commenced, prosecuted and concluded while it was an existing law, and rely upon the rule announced in many authorities, that where the right and remedy is given by statute to bring a civil action for the collection of a license tax, the repeal of the statute destroys the remedy unless the repealing statute contains a saving clause.

Spears v. *County of Modoc*, 101 Cal. 303;
Anderson v. *Burns*, 122 Cal. 273;
State Hospital v. *Flaherty*, 134 Cal. 315;
Ball v. *Tolman*, 135 Cal. 375;
City of Sonora v. *Curtin*, 70 Pac. 674;
Sutherland Stat. Constr., Secs. 162, 163, 166, and authorities there cited;
Endlich on Int. of Stats., Secs. 478, 480.

This principle has been applied more frequently to penal statutes and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter, and in such cases the proceeding will be arrested at the very point where it is at the time of the repeal. (*Spears* v. *County of Modoc supra*) because: "The repeal of the law imposing the penalty is of itself a remission." (*State* v. *Railroad Co.*, 3 How. 534, 552, and authorities there cited.)

The ordinance under discussion was adopted May 31, 1900; it went into effect fifteen days thereafter. This action was commenced June 25, 1900. The amendment to the Code, section 3366, was approved

March 23, 1901. The judgment in this case was entered March 7, 1902. Under these circumstances does it necessarily follow that because a saving clause was not inserted, the act of 1901 should be given a retrospective operation? Does this question not depend upon the circumstances and conditions of each particular act, its nature and character? In the present case the transaction between the parties, under the ordinance of 1900 was closed; nothing was left to be done except to collect the license due which was authorized by the law then in force. Upon the facts of this particular case can it be said that it was the intention of the legislature by the passage of the act of 1901 to annihilate the cause of action provided for in the act of 1897, and terminate all pending suits for its enforcement, or was it simply to take away the power of the board of supervisors in the future to license for revenue only?

In *The City of Oakland* v. *Whipple*, 44 Cal. 303, 305, which was an action for the recovery of a delinquent tax which was levied for the year 1869, and the action for its collection was commenced January 17, 1870, it was argued that the law under which said action was commenced was repealed after service of summons and before judgment; and it was there, as here, contended that the act passed in 1870 repealed all prior acts so far as they conflicted with that act, and that the plaintiff was left without any cause of action, and was not thereafter entitled to maintain an action for the collection of a tax theretofore levied. The Court said "To hold that the act (of 1870) was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the constitution, would not be inferred, but must be made apparent by clear and unequivocal language. That construction is not necessary in order to give full effect to the act, and, in our opinion, it was not intended that the act should have a retrospective operation; but the intent was that the

taxes then due should be collected according to the law then in force."

In *The Town of Belvidere* v. *Railroad Co.*, 34 N. J. L. 193, 195, where an act authorizing the levying of a certain tax on the capital stock of the defendant was repealed after an assessment of the tax, but before its collection, it was held that the repeal did not prevent the collection of such tax, its collection being regulated by the general tax law, which had not been repealed. In the course of the opinion the Court said: "The general legal rule, as found in *Dwar on Stat.* 676, is referred to, viz., 'That when an act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed.' But even if we accept this definition as strictly correct in its application to every case, still it is not perceived how, by force of it, the present tax is to be avoided. The case seems to fall within the exception contained in the rule as just quoted. The assessment of this tax closed and ended the transaction, so far as the act of 1862 was concerned. That act authorized the assessment, and appointed the mode of making it, but it had nothing to do with its collection, which was and is altogether regulated by other acts. When, therefore, this assessment was made, the force of the act of 1862 was, with respect to it, wholly spent and exhausted; the thing authorized to be done was completely done, and the consequence is, that even on the most stringent application of the rule as claimed, a repeal of the statute cannot invalidate a proceeding that was fully perfected while such statute continued in force. * * * As a question of intention, it is certainly very improbable that the legislature in 1866, by the repeal of the act of 1862, intended to annul assessments which had been made under the latter act, and which remained uncollected by reason of litigation, or from any other cause. Such a supposition would be most unreasonable. * * * As the tax now in controversy was assessed during the existence of the act of 1862, and as the proceedings for its

collection do not depend on that act, my conclusion is, that the subsequent repeal of that statute cannot, on general principles, invalidate such assessment."

See, also,

Dodge v. *National Bank,* 109 Fed. 726, 731, and authorities there cited.

The defendant in error contends that the license fee or tax, after the preliminary steps taken for its collection, became a debt (and it is so expressly declared to be in the ordinance in question); and that it had a vested right to collect the same. It has frequently been held that a direct tax duly assessed and levied upon real or personal property, is not a debt within the broad meaning of that term. But a license fee or tax does not stand upon the same plane. It is true that a vested right is usually based upon contracts, but it may also be based upon transactions in the nature of a contract.

In *Sutherland on Stat. Const.* Sec. 164, the author said:

"When a right has arisen on a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right which stands independently of the statute."

The same rule is laid down by the Supreme Court of the United States in *Steamship Co.* v. *Joliffe,* 2 Wall. 450, 455, where a pilot licensed under a statute had tendered his services to pilot a vessel out of port, and such services were refused, the Court held that his claim to the half pilotage fees, allowed by the statute in such cases became perfect, and that the subsequent repeal of the statute did not affect the judgment rendered in an action brought to recover his claim. In the course of the opinion the Court said: "The tran-

saction * * * between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract. The absence of assent on the part of the master or owner of the vessel did not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. * * * In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one; and the liability thus arising is said to be a liability upon an implied contract."

In the present case the plaintiff in error did not directly promise to pay the license tax demanded by the defendant in error, but he herded and grazed his sheep in Sierra county when the law for the imposition and collection of the license tax was in full force and effect. He reaped the full benefit of the law, and then refused to comply with it. Do not these facts virtually bring this case within the rule announced in the Joliffe case?

Similar principles are announced in *United States* v. *Williams,* 8 Mont. 85, 90, where the defendant sought to avail himself of the repeal of the regulations by the Secretary of the Interior forbidding the cutting of timber on the public land. In the course of the opinion the Court said; "The question then arises, What were the rights of the United States in relation to this timber? * * * The timber had been unlawfully cut and converted and the right of the United States to receive compensation for its property completely vested. What effect, then, did the subsequent revocation of these rules and regulations, touching the cutting of such timber, have upon this right? We take it that the modification of the rule is analogous to the repeal of the statute, and that its effect must be determined by the rules of law, governing the repeal of the statute under which the alleged right had arisen, and which was being prosecuted in the courts, but still had not been reduced to a judgment."

After referring to the general rule, the Court said: "But there are certain exceptions to this general rule. Where trouble and expense may have been incurred, and suits may have been instituted, the effect of a retrospective construction of repealing statutes is entirely to derange the plans and defeat the arrangements of parties who have proceeded on the faith of antecedent legislation, and an effort has been made to arrest these results and certain exceptions have been made to this retroactive legislation. Where, then, a right in the nature of a contract has vested under the original statute, then the repeal does not disturb it." The Court then states and approves the rule in the case of *Steamship Co.* v. *Joliffe, supra,* and adds: "While the action in the present case cannot be said to be one of contract, but an action of tort for the wrongful cutting and conversion of the timber of the plaintiff, it is hard to imagine a distinction between the right to recover for trees cut and converted wrongfully, and money due for their delivery under contract. If the right is vested in the one case, it seems to us it is equally as clearly vested in the other. Indeed, the timber when cut may be deemed personalty, and the plaintiff might waive the tort, and sue for it in assumpsit as so many cords of wood sold and delivered. It seems to us, then, that the plaintiff's right in this case comes within the exceptions to the general rule already stated, by which the right of action is defeated upon the repeal of the law under which it was brought."

The following additional authorities are cited:

> *Appeal* v. *Western Md. R. R. Co.*, 50 Md. 293; *Eastman* v. *County of Clackamas*, 32 Fed. 31-34.

Petitioner's criticism of the decision brings up the question as to whether there is such a conflict between the case as decided by the Circuit Court of Appeals,

and the cases of *Sonora* v. *Curtin* (137 Cal. 583) and *Santa Monica* v. *Guidinger* (137 Cal. 658) as decided by the Supreme Court of the State of California, as would compel this Court under the rule cited by petitioner, and of which there is no question, and no complaint, to follow the decisions of the Supreme Courts of California last cited as being a part of the local law on the point in question.

With due respect to the learned and eminent counsel for petitioner it is submitted that the conflict between the two Courts does not arise out of a construction of a statute of the state.

It is true that the Supreme Court of the State of California has in the cases cited by petitioner decided that the power to license for revenue has been repealed, but this the Circuit Court of Appeals does not controvert and for this purpose only was it necessary to construe the statute, hence as to the *construction* of the statute there is no conflict between the two courts. The conflict comes as to the effect of the new statute, construed by each court to be a repeal of a prior statute, upon the rights of the litigant granted under the prior statute, the Circuit Court of Appeals first assuming, but not deciding, that the ordinance *may* have been a revenue measure, and the Supreme Court of California deciding that in its cases the ordinance *was* a revenue measure. This question did not involve the construction of the statute; it was merely the determination of a question that depended upon the principles of general law and not upon a positive statute of the state. In such cases courts of the United States are not required to follow the decisions of the State Courts.

Hough v. *Texas* and *Pacific R. R. Co.*, 100 U. S. 226. (25 L. Ed. 618);
Pine Grove Township v. *Talcott*, 86 U. S. 666 (22 L. Ed. 232);
Venice v. *Murdock*, 92 U. S. 494 (23 L. Ed. 583);
Clapp v. *Otoe County*, 104 Fed., 474;

Gilbert v. *American Surety Co.*, 121 Fed. 499-502;
City of Ottumwa v. *City Water Supply Co.*, 119, Fed. 324.

The reason for the rule that when the decision of a question involves the construction of a state statute the decision of its highest court should be followed is stated by this Court in *Norton* v. *Shelby County* (118 U. S. 425), but in a case like the present where the Court applies a state statute to a situation not involving the construction of the statute, while the decision of the State Court is entitled to the highest consideration, it is only to be followed when consistent with the general law upon the subject.

The decision in *Sonora* v. *Curtin* followed in *Santa Monica* v. *Guidinger,* is wrong, in so far as it conflicts with the decision of the Circuit Court of Appeals in this case. It does not appear that the authorities upon which the Circuit Court of Appeals relied were before the Court, and the Court seems to narrow the purpose of the action into the recovery of a penalty solely, and not a debt, and in his application of the case here petitioner would deny that he had received any benefit from the ordinance.

In treating the sum sued for as a penalty the Court was probably affected somewhat by the fact that a ten dollar penalty was added to the demand for a three dollar tax, while in the case at bar the penalty of fifty dollars provided for by the ordinance is not sued for. (Transcript fol. 4, p. 3—fol. 8, p. 5.)

The Court says:

"The defendant does not owe for any license be-"cause he refused to take out a license. The recovery "is sought for his refusal."

Is this not the reason for every recovery in case of debt.

Petitioner asks, "What benefit did he reap?" "What benefit did the law confer on him?" These

questions are answered by the facts that he was protected in his business, and the protection paid for by the county; that his damage to public property was repaired and paid for by the county; that lanes across valleys in the fenced portions of the county were furnished him by which he could conveniently reach pastures, and in numerous ways was he benefited. Even treating the ordinance, for the sake of argument, as a revenue measure, one of its aims was reimbursement for these expenses. In effect the county proposed to petitioner that if he came to the county to raise, graze, herd and pasture his sheep that roads and trails damaged by him would be repaired for other travelers, that he would be given the protection of the police force of the county, etc., etc., for a contribution on his part of a part of the expenses of the county government, and he commenced to transact his business in the county after this proposal, did he not in effect accept it?

It is respectfully submitted that the judgment of the Circuit Court be affirmed.

C. N. POST,
W. J. REDDING,
FRANK R. WEHE,
Attorneys for Respondent.

In the

Supreme Court of the United States.

October Term, 1904.

P. L. FLANIGAN
vs.
THE COUNTY OF SIERRA,

No. 121

PETITION FOR RE-HEARING.

The County of Sierra, the defendant in error, now presents its petition for a re-hearing herein and states the grounds thereof as follows:

First: That the California cases cited do not support that portion of the opinion which holds that the Ordinance in question here is a revenue measure.

a. The clear effect of such holding is that in all cases in California where a license tax is fixed upon the business of raising, grazing, herding or pasturing sheep that, *as matter of law,* the Ordinance fixing the license is a revenue measure, regardless of what extra expense the business may entail upon the county, and notwithstanding the fact that the expense is one which cannot be provided for in advance without a knowledge in advance of the number of persons who may

engage in the business, and if an attempt is made to provide for it in advance by the ordinary tax levy and no person does business in the county, there will be a surplus of funds, and if no provision is made and sheep are grazed, there is a deficiency; an expenditure which if provided for by the ordinary tax levy, puts an unjust burden upon the citizens of a county in cases like the one at bar, where the person doing business in the county pays all of his property taxes in the State of Nevada, the effect being that the citizens of the county are burdened with the cost of the protection of a business, the owners of which contribute nothing to the cost of the protection they receive.

With all due deference to the Court, it is contended that each case must be judged by its own facts, and an ordinance fixing a license tax upon a business which is the subject of regulation is a police measure or a revenue measure, according as the money raised by the license tax fixed is needed to pay the extra cost of government made necessary by that business, or to pay the ordinary and general expenses of the county government.

The Legislature of this State has said in effect (and such was the law at the time of the passage of the ordinance at bar) that counties may license the business of raising, grazing, herding and pasturing sheep, and fix the rate of license tax upon the same

for purposes of regulation, and if at a trial the county can show that the amount of the license tax fixed for the transaction of that business in the county is reasonably necessary for the purpose of paying the costs of regulating the business, the ordinance levying the tax would certainly be valid.

b. 72 Cal. 387 (*Lassen County vs. Cone*) was decided after a trial on the merits, at which trial it was shown and found by the Court that defendant owned a large quantity of land in the county upon which he grazed his sheep.

That another reason for characterizing the ordinance in that case as a revenue measure was the fact that the board which passed it seemed to consider the license tax levied as interchangeable and similar to the property tax levied for purposes of revenue. (p. 388.)

73 Cal. 365 (*Ex parte Mirande*) is authority *in favor* of the position that the license was imposed for purposes of regulation, as appears from the following language quoted from the Opinion:

"We do not deem it necessary to discuss the ques-
" tion as to whether the license in question is imposed
" for revenue purposes, or for purposes of regulation,
" for the reason that the board possessed authority to
" impose it for either, or both."

119 Cal. 119 (*County of Inyo vs. Erro.*) In this case the question is not touched.

Town of Santa Monica vs. Guttinger, 137 Cal. 658. In this case the ordinance on its face recited that it was for the purpose of revenue as well as regulation.

City of Sonora vs. Curtin, 137 Cal. 583. In this case an attempt was made to levy a license tax upon the business of practicing law, which business the Court holds cannot be subject to any police regulation whatever, which does not fall within the power of taxation for revenue, *for the reason that the business is not dangerous to the public, either directly or indirectly.*

These two cases are easily distinguished from the case at bar.

"An opinion in a particular case founded on its "special circumstances is not applicable to cases "under circumstances essentially different." (Mr. Chief Justice Marshall) *Brooks vs. Marbury*, XI Wheat. 91.

"The language of a decision must be considered in "the light of the circumstances involved in the case "before the Court."

Coburn vs. Brooks, 78 Cal. 446.

In conclusion on this point it may be pertinent to state that this is the first time that the distinction between the power to levy a license tax for purposes of regulation, and for purposes of revenue, as concerns the amount of the tax, in a case where the business is clearly a proper subject for regulation, has been seriously considered. The necessity for it did not arise until the repeal of the power to license for revenue.

Second: In support of the Opinion of the Circuit Court of Appeals, counsel neglected to call the attention of this Court to the case of *San Luis Obispo vs. Hendricks*, 71 Cal. 243, decided by the Supreme Court of California in Bank.

Discussing the license tax of the same nature as at bar, the Court say:

"The license tax sought to be recovered in this "action is not a penalty, but in the nature of a *debt* "due from the defendant to the county, or what is "the same thing for present purposes, a duty devolved "upon the defendant personally, which can be en- "forced precisely as though he had contracted with "the county to pay such sum of money." (p. 245.)

That the license tax sought to be recovered here is in the nature of a debt—a duty to pay—is the reason for the judgment of the Circuit Court of Appeals. This point does not seem to be considered by the Court in *Sonora vs. Curtin*. At any rate there is no indication in the Opinion that the cases, controlling the judgment of the Circuit Court of Appeals were cited.

A question decided without argument remains still an open question.

(Per Baldwin, J.) *Decatur vs. Paulding*, 14 Pet. 607.

In the premises it is respectfully submitted that a re-hearing be granted.

FRANK R. WEHE,
Attorney for Petitioner.

I hereby certify that the above and foregoing petition for a re-hearing in my judgment is well founded and is not interposed for delay.

Frank R. Wehe

Supreme Court of the United States.

No. 121.—October Term, 1904.

P. J. Flanigan, Petitioner, vs. The County of Sierra. } On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 20, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

This action was brought by respondent against petitioner in the Superior Court of the County of Sierra, State of California, and removed on his motion to the United States Circuit Court.

The action was brought to recover the amount of license ordained under an ordinance passed May 31, 1900, by the supervisors of the respondent county, under what is known as "The County Government Act." (Cal. Stat. 1897, Ch. CCLXXVII.) The act gave power to the Boards of Supervisors of counties as follows:

"To license for regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county, and all shows, exhibitions, and lawful games carried on therein, to fix the rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise." (Sec. 25, subd. 25.)

In pursuance of the power conferred the ordinance in controversy was enacted, section 1 of which is as follows:

"Each and every person, copartnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the county of Sierra, State of California, must annually procure a license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm or corporation, and used in such business in said county."

Application for a license is required to be made by affidavit, stating the number of sheep owned by and in possession of the applicant. "The license tax," it is provided, "shall be deemed a debt due to the county," which the district attorney of the county is directed to sue for; and a judgment is authorized. In case of recovery by the county, $50 damages and costs must be added to the judgment. All money collected for license, less a fee of ten per cent for collection, "shall be paid over to the county treasurer, as other moneys are, and be placed to the credit of the general funds

of the county." Years within the meaning of the ordinance shall commence on the 1st day of January and end on the 31st day of December.

The petitioner between the 1st of May and the 25th of June, 1900, engaged in the business described in the ordinance, and had in his possession and under his control 25,000 sheep. He failed to apply for a license, and became, it is alleged, indebted to the county for the sum of $2,500, and became further indebted to the sum of $50 by way of damages for his neglect. Payment of both sums were demanded.

Petitioner demurred to the complaint, which, being overruled, and he having declined to answer, judgment was taken against him. It was affirmed by the Circuit Court of Appeals. (58 C. C. A. 340)

The ordinance was passed on the 31st day of May, 1900, and suit was brought on the 25th day of June of that year. On March 23, 1901, by an amendment to the Political Code of the State of California, (section 3366, Stat. Cal. 1900, 1901, p. 635,) the authority of the board of supervisors to license for revenue was repealed. The repealing provision is as follows:

"Boards of supervisors of the counties of the State, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions, and all shows, exhibitions and lawful games carried on therein, to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

It is contended that the ordinance imposing the license was a revenue measure, not a police regulation, and that the law under which it was enacted, having been repealed, the suit abated. And, it is also contended, that there was no power to pass the ordinance. The latter contention is certainly untenable. (*Ex parte Mirande*, 73 Cal. 365.) The former requires some discussion. There are two parts to it—the character of the ordinance, as being for revenue or regulation, and the effect of the repeal of the ordinance. Under the authority of the California cases, it must be regarded as a revenue measure. (72 Cal. 387; 73 Cal. 365; 119 Cal. 119; *Town of Santa Monica*, 137 Cal. 658; *City of Sonora* v. *Curtin*, 137 Cal. 583.)

In *Merced County* v. *Helm*, (102 Cal. 159,) the court said, distinguishing between the taxing power and the police power, that the latter "is exercised in the enforcement of a penalty prescribed for the non-compliance with the law, or for the doing of some prohibited act." It was provided by the ordinance passed on that the license should be a "debt," payable in advance and to be collected, in case of non-payment, by suit. The absence of regulatory provisions has also been held to be an element in determining the character of an ordinance. (*Town of Santa Monica* v. *Guidinger*, 70 Pac. Rep. 732.) The ordinance in controversy in the case at bar was, at least, assumed by the Circuit Court of Appeals to be a revenue

measure. This being its character, what was the effect of its repeal? It withdraws the power of collecting the tax, petitioner contends. The Court of Appeals did not take this view. The court regarded the right of the county as vesting at the date of the imposition of the license, and that the liability of petitioner was so far contractual as to be unaffected by the repeal of the statute giving power to the county to enact the ordinance. We are unable to assent to this view. It is disputable under the authorities, and it is opposed to the decisions of the Supreme Court of the State of California.

The general rule is that powers derived wholly from a statute are extinguished by its repeal. (Southerland on Statutory Construction, § 165.) And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. (9 Bacon's Abridgement, 226.) This doctrine is oftenest illustrated in the repeal of penal provisions of statutes. It has, however, been applied by the Supreme Court of the State of California to the repeal of the power of counties to enact ordinances for revenue.

Town of Santa Monica v. *Guidinger*, (137 Cal. 658,) was an action for the recovery of $50 for license imposed under an ordinance of the town "for the license of business carried on in the town . . . for the purpose of regulation and revenue." The defendant was charged with two license taxes for $25 each for the year following the date of the ordinance, that being the annual date established by the ordinance, "for each person acting as agent or solicitor for any laundry without the corporate limits of the town." It was held that the license tax was repealed, and the right of action therefore extinguished, by section 3366 of the Political Code, added thereto by the act of March 23, 1901. This is the same section relied upon in the case at bar. The court said it was clear that the license tax in question was imposed for the purpose of raising revenue, and that the case was therefore substantially similar to that of *City of Sonora* v. *Curtin*, (137 Cal. 583.) The ordinance involved in the latter case contained penal provisions, but they manifestly did not determine the decision. The court observed:

"The right is given by the ordinance to bring a civil suit to recover the amount so made a license tax. The civil remedy was created by the ordinance, and the remedy is repealed by the repeal of the ordinance as to revenue. In speaking of the rule as to enforcements of rights under repealed statutes, Endlich on the Interpretation of Statutes, section 480, says: 'The same rule applies to rights and remedies founded solely upon the statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone.'"

It is clear that the decision was not based alone on the penal character of the ordinance but on the broader principle that the power to enact it having been taken away the power to enforce it was also taken away. The cases cited by the court illustrate this. Among others, *State Hospital* v. *Flaherty*, (134 Cal. 315,) was cited. In that case the right given by a statute of the State to maintain an action against the father of an insane adult son was held to be taken away by the repeal of the statute conferring the right.

But if the ordinance passed on in *Town of Sonora* v. *Curtin* was penal, the ordinance involved in the case at bar may be so characterized within the limits of the principle we are now discussing, as applied by the Supreme Court of the State of California. What it might be under broader considerations see *Huntington* v. *Attrill*, (146 U. S. 657.)

That there is a conflict between the Supreme Court of the State and the Circuit Court of Appeals respondent does not deny. Counsel, however, say the conflict "does not arise out of a construction of a statute of the State," but (we quote the language of counsel) "as to the effect of the new statute, construed by each court to be a repeal of a prior statute, upon the rights of the litigant granted under the prior statute, the Circuit Court of Appeals first assuming, but not deciding, that the ordinance *may* have been a revenue measure, and the Supreme Court of California deciding that in its cases the ordinance *was* a revenue measure. This question did not involve the construction of the statute; it was merely the determination of a question that depended upon the principle of general law and not upon a positive statute of the State." The counsel further say: "In such cases the courts of the United States are not required to follow the decision of State courts." The distinction made by counsel we cannot adopt. Whether a statute of a State is or is not a revenue measure certainly depends upon the construction of that statute. Besides, if in any case we should lean to an agreement with the State court, this is such a case. There is no Federal right involved. The question is one strictly of the State law; and the power of one of the municipalities of the State under that law. If we should yield to the contention of counsel we should give greater power to one of the municipalities of the State than the law of the State, as construed by the Supreme Court of the State, would give it. We should enforce against petitioner a tax which the Supreme Court of the State, construing a State law, would not enforce. The result of the contention indicates its error.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.